

FILED

MAR 31 2003
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WESTERN DISTRICT OF TEXAS
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**VS.**

CIVIL NO. SA-99-CA-1119-FB

Respondent.

Petitioner Timothy Cockrell filed this federal habeas corpus action pursuant to Title 28 U.S.C. Section 2254 seeking relief from his July, 1993, Bexar County conviction for the capital murder of Sandra Deptawa and the jury's imposition of a sentence of death. For the reasons set forth hereinafter, petitioner is entitled to neither habeas corpus relief nor a Certificate of Appealability from this Court.

### A. Factual Background

## 1. The Indictment

On October 14, 1992, a Bexar County Grand jury indicted petitioner Timothy Cockrell in cause no. 92-CR-6426 on a charge of capital murder, more specifically for the murder of Sandra Deptawa committed in the course of robbing and burglarizing his victim.<sup>1</sup>

<sup>1</sup> A copy of the indictment against petitioner appears among the documents, motions, and pleadings filed in petitioner's state trial court proceedings furnished to this Court by respondent on April 5, 2000 (henceforth "Transcript"), volume one, at p. 7. The first paragraph of the indictment charged petitioner with having intentionally and knowingly caused the death of Sandra Deptawa on or about August 9, 1992, by strangling Sandra Deptawa with a deadly weapon, to

## 2. Pretrial Hearing Re Petitioner's Statement

Shortly after his arrest on a parole violator warrant on August 10, 1992, the petitioner gave a signed, three-page, written statement prepared by San Antonio Police Homicide Detective George Saidler in which the petitioner admitted, in pertinent part, that (1) he had helped move Sandra Deptawa into her new residence, (2) on the morning of August 9, 1992, he went to Deptawa's residence for the purpose of taking "her stuff" to help support his cocaine habit, (3) he gained entrance to the residence by telling Deptawa that he was there to repair a table leg that had been broken during the move, (4) once inside the house, he grabbed her from behind, took her to the floor, put his knee in her back, tied her hands behind her back, and tied her mouth with a belt, (5) he took a .25 caliber gun, a black wallet, a vacuum cleaner, an answering machine, and drove away in Deptawa's car, (6) he sold the handgun and the other items he took from Deptawa's residence "one at a time" and later rented Deptawa's car to a friend of his named "Sonny" who found Deptawa's wallet in the vehicle, (7) he did not know how Deptawa's body wound up in her bathtub, (8) he could not remember whether he sexually assaulted her, and (9) he was so strung out on drugs he could not remember everything that happened at Deptawa's house, and (10) he went to Deptawa's house by himself and did not intend to rape or kill her when he went there.<sup>2</sup>

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wit, an object unknown to the grand jury, while in the course of committing and attempting to commit the offense of the robbery of Sandra Deptawa. The second paragraph of that indictment alleged that the petitioner intentionally and knowing caused Sandra Deptawa's death by strangling her with an object unknown to the grand jury while in the course of committing and attempting to commit the offense of the burglary of Sandra Deptawa.

<sup>2</sup> See State's Exhibit 83, included in the Statement of Facts from petitioner's trial (henceforth "S.F. Trial"), in Volume XXXXII. Petitioner's statement was admitted into evidence and read in its entirety before the jury at the guilt-innocence phase of petitioner's trial. See S.F. Trial, Volume XXXII, testimony of George Saidler, at pp. 5570-78.

Not surprisingly, petitioner's lawyers attempted to suppress petitioner's statement. Among other things, petitioner's trial counsel argued and introduced evidence suggesting petitioner's confession was involuntary and petitioner was incompetent at the time he purportedly gave his statement to Detective Saidler. However, after an extensive pretrial hearing,<sup>3</sup> the state trial court ruled petitioner's written statement was admissible.<sup>4</sup>

3. Guilt-Innocence Phase of Trial

a. The Prosecution's Case

(1) General Fact Witnesses

At the guilt-innocence phase of trial, (1) Annur Arrad, owner of a small moving business, testified he employed the petitioner to assist in moving Sandra Deptawa's possessions into her new residence on August 7, 1992, and during the move, pieces fell off an antique table,<sup>5</sup> (2) two civilian witnesses, including Sandra's mother, testified regarding the grim circumstances surrounding the discovery of Sandra's half-nude body in the bathtub of her residence early on the afternoon on Sunday, August 9, 1992,<sup>6</sup> (3) a San Antonio Police Officer testified regarding the

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<sup>3</sup> The hearing held in connection with petitioner's attempts to suppress or exclude his written statement fills most of volumes III through IX of the Statement of Facts from petitioner's state trial court proceedings.

<sup>4</sup> See S.F. Trial, Volume IX, at p. 623.

<sup>5</sup> See S.F. Trial, Volume XXX, testimony of Annur Arrad, at pp. 4803-77.

<sup>6</sup> Larry McKinney testified that (1) around two p.m. that date, he and several others heard a hysterical woman's screams that "her baby" was drowning, (2) he and the others followed the screaming woman into Deptawa's residence and discovered Sandra's lifeless body in the bathtub in a fetal position, with her arms and legs hanging over the edge of the tub, (3) Sandra's mother Barbara said that she had attempted to pull her daughter from the tub, (4) McKinney and another person lifted Deptawa's body from the tub and moved it into a bedroom, (5) he was unable to get Deptawa's arms and legs into proper position to administer CPR because rigor mortis had set in

equally grim condition of the Deptawa residence shortly after discovery of the body and identified numerous photographs taken of the crime scene,<sup>7</sup> (4) several San Antonio police officers identified a gray Mazda sports car driven by one Kelly “Kilo” Wright on August 10, 1992, during a high-speed chase, as well as certain items of personal property found inside that vehicle when Wright

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and the body was too stiff, (6) he removed a gag from Sandra’s mouth and a belt was tied around her left wrist, (7) he had difficulty removing the gag from Sandra’s mouth because it was tied very tightly around her mouth, (8) Sandra’s body was nude from the waist down, and (9) there were piles of human feces throughout the house and smeared in the carpet. See S.F. Trial, Volume XXX, testimony of Larry McKinney, at pp. 4779-4971.

Barbara Zimmerman testified that (1) she was Sandra Deptawa’s mother, (2) she last saw Sandra alive the evening of Saturday, August 8, 1992, (3) around 12:45 the next afternoon, she received a call from Sandra’s employer indicating that Sandra had failed to show up for work, (4) she went immediately to Sandra’s new residence and noticed that Sandra’s car was missing, (5) she entered through an unlocked back door and discovered Sandra’s body in the bathtub with Sandra’s head submerged beneath the water, (6) she began screaming and attempted to pull Sandra’s body out of the tub but was unable to do so, (7) Sandra’s body was stiff and in a fetal position, (8) something was tied in Sandra’s mouth so tightly she was unable to remove it, (9) after others responded to her screams, they removed Sandra’s body from the tub and took it to a bedroom, (10) at that point, Barbara was taken to another room of the house, (11) the strip of material used to secure Sandra’s mouth was a curtain tie back, (12) Sandra’s purse was later found to be empty and Sandra’s wallet was never recovered, (13) she noticed fecal material on the floor near the front door, and (14) Sandra’s estranged husband was a drug dealer named Toby Deptawa. See S.F. Trial, Volume XXXIV, testimony of Barbara Zimmerman, at pp. 5789-5838.

<sup>7</sup> San Antonio Police Detective Richard Roberts testified that (1) the condition of the furniture and furnishings around the house, particularly in the bedroom, suggested that a struggle had occurred there, (2) Sandra’s body was in full rigor mortis when he arrived at the scene, (3) fecal material was smeared in several locations throughout the house and the water in the bathtub was discolored, (4) a pair of denim shorts and women’s underwear were found on the floor in the bathroom near smeared fecal material, (5) another pair of panties and a pair of ladies’ blue jeans were found in the dining area of the house, (6) it is easy to destroy fingerprints and other latent evidence, especially when water is used or involved, and (7) the location of the fecal material throughout the house suggested strangulation to him. See S.F. Trial, Volume XXXI, testimony of Richard Roberts, at pp. 5044-5127.

was finally stopped for reckless driving,<sup>8</sup> (5) Marvin Leal testified that, late on the evening of August 9, 1992, the petitioner sold Leal a chrome, pearl-handled, .25 caliber handgun for forty dollars,<sup>9</sup> (6) Sandra's brother, Mitch Rohde, testified that (a) he sold Sandra the gray, 1985 Mazda

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<sup>8</sup> San Antonio Police Officer Allan Ballew testified that (1) he arrested Kelly Wright after Wright, driving a gray Mazda sports car, drove recklessly through a store parking lot and then led police on a high-speed chase through a residential neighborhood on the afternoon of August 10, 1992, (2) Wright was the only occupant of the vehicle, and (3) in an excited state at the time of his arrest, Wright claimed that he had not stolen the car but had obtained it from someone else. See S.F. Trial, Volume XXXI, testimony of Allan Ballew.

San Antonio Police Officer Barney Whitson testified that (1) he assisted in surveillance on the stolen Deptawa vehicle and participated in the high-speed chase thereof on August 10, 1992, (2) shortly after Wright was stopped and arrested, Shannon Haynes and Patrick Carter arrived at the scene and insisted that Wright had obtained the vehicle from the petitioner, (3) he located what he believed was the petitioner's apartment but no one answered when he knocked, (4) after consulting with a local resident named Adrian Taylor, he determined he had the correct apartment but, by the time he arrived back at the petitioner's apartment, other officers were inside talking with the petitioner, (5) after checking with his dispatcher, he determined that the petitioner was wanted for a parole violation, (6) he placed the petitioner under arrest and gave the petitioner his Miranda warnings, (7) the petitioner indicated he understood his rights, denied he had anything to do with the capital murder of Deptawa, and denied knowing anything about the crime, (8) he transported petitioner to the police station, (9) at no time did the petitioner indicate he wanted an attorney or did not understand his rights, (10) Detective Saidler interviewed the petitioner for three or four hours, briefly leaving the office during the interview twice, (11) at no time did he witness any physical abuse being administered to the petitioner and he never saw any signs the petitioner had been physically abused, (12) the petitioner appeared calm throughout the interview, and (13) the petitioner appeared remorseful and said he was sorry for what he had done. See S.F. Trial, Volume XXXI, testimony of Barney Whitson, at pp. 5196-5305.

San Antonio Police detective Matt Hernden testified that (1) he photographed and processed the gray Mazda sports car for fingerprints on August 10, 1992 and (2) he found several belts and a pillow case inside the vehicle, along with several items of jewelry (a turquoise necklace, earrings, a charm bracelet or necklace with a gold plated circle bearing the name "Sandra"), a makeup case, a chain, a peach clutch purse, and two drawers. See S.F. Trial, Volume XXXII, testimony of Matt Hernden, at pp. 5357-5410.

<sup>9</sup> See S.F. Trial, Volume XXXIII, testimony of Marvin Leal, at pp. 5697-5727. On cross-examination, Leal admitted that (1) he was then facing federal weapons and drug charges, (2) he later sold the gun to someone else, and (3) in exchange for his testimony against the petitioner, prosecutors had agreed not to bring any new charges against him arising out of either his purchase

sports car which Wright was driving at the time of his arrest, (b) the jewelry box drawers found inside the vehicle when Wright was stopped were from Sandra's jewelry box, and (c) the handgun identified by Leal and later recovered by police was Sandra's,<sup>10</sup> and (7) a pawnshop owner testified that, on May 12, 1992, he sold Sandra Deptawa the same .25 caliber handgun identified by Mitch Rohde as Sandra's and by Marvin Leal as the one the petitioner sold to Leal on August 9, 1992.<sup>11</sup>

(2) The Driver of Sandra's Stolen Car

Shannon "Sonny" Haynes testified that (1) he saw the petitioner driving a gray Mazda sports car late on the evening of August 9, 1992, (2) the petitioner "rented" the car to Haynes that same night, (3) he found a wallet inside the vehicle containing a driver's license which bore the photograph of Sandra Deptawa, (4) the petitioner said the lady on the driver's license was his girlfriend and took the wallet from Haynes, (5) he saw the petitioner remove several items from the vehicle, including a vacuum cleaner and two boxes, one of which contained an answering machine, (6) the petitioner offered to sell the answering machine to Haynes but he declined the offer, (7) he returned the vehicle to the petitioner around nine a.m. the next day, (8) he later saw other people driving the vehicle and saw five or six people hanging around or on the vehicle, (9) Kelly Wright took off in the car and, when Wright returned, the police were in pursuit, (10) he and several others took off in pursuit of Wright but, by the time they caught up to him, Wright

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of the handgun in question from the petitioner or his subsequent sale thereof. Id. at pp. 5712-34.

<sup>10</sup> See S.F. Trial, Volume XXX, testimony of Mitch Rohde, at pp. 4972-5023.

<sup>11</sup> See S.F. Trial, Volume XXXIV, testimony of Raymond Cervantes, at pp. 5749-62.

was in custody in the back seat of a police vehicle, banging his head against the window, saying he didn't do it, and (11) Haynes offered to take the police to petitioner's apartment.<sup>12</sup>

(3) The Autopsy Results

The medical examiner testified that (1) he conducted the autopsy on Sandra Deptawa's body on August 10, 1992, (2) his external examination of her body revealed (a) Sandra was wearing only a pullover shirt and bra, (b) a cloth and leather belt was tied to the left wrist, (c) a twenty-five inch strip of lavender cloth accompanied the body, (d) the tip of Sandra's tongue was clenched tightly between her teeth, (e) her face was reddish and congested in appearance, (f) her right upper eyelid was swollen and discolored secondary to eye hemorrhage, (g) little hemorrhages were present in both eyelids with a larger hemorrhage in the outer corner of the right eye along with an abrasion, (h) a ladder-like bruise appeared on the right side of the neck along with abrasions, (i) contusions to both knees, and (j) bruises to the right upper arm and the radial or outer aspects of both wrists, (3) he believed the lavender trim caused the mark on Sandra's neck as it was tightened around her neck, (4) the lavender sash cloth could have caused asphyxiation if tightened sufficiently, (5) Sandra's body showed indications of asphyxiation in the form of her reddened face and hemorrhages in the eyes and eyelids, (6) his internal examination of Sandra's body revealed (a) hemorrhages in the muscles on the right side of the neck, (b) a fracture to the

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<sup>12</sup> See S.F. Trial, Volume XXXII, testimony of Shannon Haynes, III, at pp. 5411-5515. On cross-examination, Haynes admitted that (1) he was then under indictment for attempted capital murder of a police officer, attempted murder, theft of an automobile, aggravated assault with a deadly weapon, criminal trespass, evading arrest, and unlawfully carrying a weapon, (2) he, Kelly Wright, and Patrick Carter are all members of the same gang, and (3) Kelly Wright was at that time under indictment for aggravated robbery, attempted murder, and unlawfully carrying a weapon. Id. at pp. 5456-5514.

neck at the front near the voice box or larynx on the right side, (c) additional hemorrhages and fractures on the left side of the neck near the larynx, (d) an empty stomach, (e) no alcohol or drugs in the blood, and (f) no drugs in the vitreous fluid in the eyes, (7) he believed the cause of Sandra's death was strangulation, (8) Sandra's body bore indications of both manual strangulation (her fractured neck bones) and ligature strangulation (the marks on her neck), (9) Sandra was strangled with sufficient force to break the thyroid cartilage and bones in the neck, (10) strangulation can be fatal even if the airway remains open if it cuts off the blood flow to the brain, (11) death by strangulation typically occurs in stages, with loss of consciousness coming approximately fifteen seconds after blood flow to the brain is cut off and cessation of breathing coming after about ninety seconds of constant pressure sufficient to cut off blood flow to the brain, (12) the hyoid bone in Sandra's neck, which was fractured, is difficult to damage because of its location (it is usually protected by the jaw) and only strangulation with extreme force would cause it to fracture, (13) Sandra's bruises appeared to have been inflicted before she died, (14) Sandra's face showed indications she received a blow to that area, possibly from a fist or from striking a blunt surface such as the floor, (15) the contusions on her knees were consistent with her having been forced to the floor, (16) loss of sphincter control is common in strangulation deaths, along with an accompanying loss of urine and feces from the body, (17) there was no water in Sandra's lungs, thus indicating she was dead before she was placed in the bathtub, (18) the petitioner's description of his assault upon Sandra was consistent with her injuries, (19) there were no indications Sandra's legs were tied up, (20) while rigor mortis usually occurs in about eight hours after death, its onset can be accelerated greatly when the victim dies during or immediately after a violent struggle, (21) rigor mortis was present in Sandra's jaw, arms, and legs at the crime

scene, (22) Sandra did not drown, (23) the most likely cause of Sandra's death was a combination of both manual and ligature strangulation, (24) he could not tell the time of Sandra's death, and (25) placing Sandra's body in a bathtub with water would likely wash away trace evidence.<sup>13</sup>

(4) The Petitioner's Confession

San Antonio Police Detective George Saidler testified that (1) he had no role in the investigation of Sandra Deptawa's murder on August 9, 1992, (2) the following day, August 10, 1992, Detective Rodriguez asked him to speak with the petitioner, who was brought to the homicide office by Officer Whitson, (3) the petitioner appeared relatively calm and said he wanted to talk with Saidler, (4) initially, the petitioner said he had nothing to do with the murder, (5) he questioned the petitioner regarding the petitioner's ability to understand and read English and read the petitioner his rights, (6) the petitioner signed and dated the card from which Saidler read the petitioner his rights, (7) when he began interviewing the petitioner, Saidler knew none of the details of the murder, (8) the petitioner gave a full account of what happened at Sandra Deptawa's house and Saidler reduced it to writing, (9) during their two-to-three hour interview, the petitioner never indicated he did not understand his rights, never indicated he did not want to confess, and never asked to speak to an attorney, (10) he re-read the petitioner his rights once he had reduced the petitioner's confession to writing, (11) he showed the petitioner five photographs from the crime scene which the petitioner initialed, (12) he typed the petitioner's confession on a computer in narrative form, reading it back to the petitioner a piece at a time, as he did so, (13) he did not attempt to record a verbatim account of what the petitioner told him, (14) the petitioner twice made

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<sup>13</sup> See S.F. Trial, Volume XXXV, testimony of Vincent DiMaio, at pp. 5877-5969.

corrections as Saidler typed, once correcting the spelling of the petitioner's name, (15) when he finished, the petitioner did not indicate he wanted to make any other corrections, additions, or deletions, (16) when he finished typing the petitioner's statement, he printed it out, laid out the three pages on his desk, and read it over with the petitioner before the petitioner signed each page in the presence of two civilian witnesses, (17) the petitioner told Saidler that neither Shannon Haynes nor Kelly Wright were involved in Sandra's murder, (18) the petitioner did not say anything about either Patrick Carter or Rodney Taylor, (19) the petitioner told Saidler that Taylor runs a gang in which Wright, Haynes, and Carter are all members, (20) the petitioner never told Saidler that he could not read, (21) on the contrary, the petitioner told Saidler he could read and write English, and (22) the petitioner said he sold Sandra's gun to a person he knew as "Beastie."<sup>14</sup>

b. The Defense's Case

(1) Fact Witnesses

In addition to vigorously cross-examining both Shannon "Sonny" Haynes regarding his own criminal record and Detective Saidler regarding the circumstances under which the petitioner

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<sup>14</sup> See S.F. Trial, Volumes XXXI & XXXIII, testimony of George Saidler, at pp. 5518-5697. On cross-examination, Detective Saidler admitted that (1) he had previously testified at a pretrial hearing that he had not read the warnings on the top of each page of the petitioner's written statement out loud to the petitioner but insisted that his previous testimony referred to the second and third pages of the written statement, not to the first page of same, Id. at pp. 5609 and 5613-23, (2) he summarized petitioner's account of the events at Sandra's house, Id. at p. 5643, (3) Patrick Carter, Kelly Wright, and Rodney Taylor were all in jail at the time of the petitioner's trial and Shannon Haynes was on bond, Id. at pp. 5662-63, (4) the warnings contained on the petitioner's statement do not conform to the requirements of state law, Id. at p. 5668, and (5) nothing prevented him from videotaping the petitioner's confession except for the fact the San Antonio Police Department does not have a room equipped with a video camera and recorder, Id. at p. 5670.

purportedly made his confession, the petitioner's defense counsel elicited testimony at the guilt-innocence phase of trial that (1) when questioned at the crime scene shortly after the discovery of Sandra's body, Sandra's mother Barbara Zimmerman suggested the police investigate Sandra's estranged husband, Toby Deptawa (who was then in jail)<sup>15</sup>, as well as Sandra's former husband Jim Crum,<sup>16</sup> (2) other persons had been seen at Sandra Deptawa's residence the night she moved in,<sup>17</sup> (3) despite the fact that many fingerprints were lifted from both the crime scene and Sandra Deptawa's vehicle, none of those prints matched the petitioner, and the petitioner's fingerprints were not found on the handgun allegedly sold by petitioner to Marvin Leal,<sup>18</sup> (4) paraphernalia associated with the use of powder cocaine was found inside a purse at the Deptawa residence,<sup>19</sup> (5) when the police first contacted the petitioner, he invited them to search his apartment,<sup>20</sup> (6) the police found none of the property stolen from Sandra Deptawa's residence in the petitioner's

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<sup>15</sup> Records from the Bexar County Adult Detention Center introduced into evidence showed Toby Deptawa was taken into custody on a parole violation warrant on April 8, 1992, and transferred to the custody of the Texas Department of Criminal Justice on November 6, 1992, and he was never released on bond during that time frame. See S.F. Trial, Volume XXXV, testimony of Warren G. Claus, at pp. 5870-76.

<sup>16</sup> See S.F. Trial, Volume XXXVI, testimony of David Valentin Gutierrez, at pp. 6086-6115.

<sup>17</sup> See S.F. Trial, Volume XXXVI, testimony of William Brittain, at pp. 6115-30.

<sup>18</sup> See S.F. Trial, Volume XXXVI, testimony of Ralph Looney, at pp. 6135-76.

<sup>19</sup> See S.F. Trial, Volume XXXV, testimony of Imelda Rodriguez, at pp. 5994-6000.

<sup>20</sup> Id. at pp. 6021-24.

apartment,<sup>21</sup> (7) the police checked the petitioner's clothes but found no trace evidence on same,<sup>22</sup> and (8) shortly after they began their investigation, the police attempted to locate a black Nissan that witnesses had indicated they had seen following Sandra Deptawa's vehicle but that search proved fruitless.<sup>23</sup>

(2) An Expert on the Petitioner's Reading Ability

Petitioner's trial counsel also introduced the expert testimony of Dr. Ronnie Alexander, an associate professor of educational psychology and special education at the University of Texas at San Antonio who had reviewed summaries of the petitioner's school records,<sup>24</sup> that (1) San Antonio Independent School District ("SAISD") officials designated the petitioner as minimally brain injured based on the petitioner's scores on various reading and academic skills tests, the Bender Gestalt Perceptual Motor Assessment Instrument, and IQ tests, (2) on one Wechsler Intelligence test given to petitioner in January, 1973, the petitioner scored 35 on the verbal component of the test and 42 on the performance component, (3) those scores placed the petitioner in the lowest three percent of the population, (4) in a second Wechsler Intelligence test

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<sup>21</sup> Id. at pp. 6031-33 and 6039.

<sup>22</sup> Id. at p. 6035.

<sup>23</sup> Id. at pp. 6011, 6046, and 6062-66. San Antonio Police Detective Imelda Rodriguez testified that two neighbors of Sandra Deptawa told police they had seen a black Nissan driven by either a Latin male or a white male following Sandra Deptawa's car between eleven and eleven thirty p.m. on August 8, 1992, but police were unable to locate either the vehicle in question or anyone who might have driven same. Id.

<sup>24</sup> Petitioner's SAISD records were admitted into evidence as defense exhibit 7 and are contained in S.F. Trial, Volume XXXXIII. In addition to Dr. Alexander's expert testimony, petitioner's trial counsel also called SAISD records custodian Rita Gomez, who testified the petitioner's school records indicate the petitioner was diagnosed as learning disabled. See S.F. Trial, Volume XXXVI, testimony of Rita Gomez, at pp. 6177-89.

administered to petitioner in December, 1978, the petitioner scored 25 on the verbal portion of the test and 37 on the performance component, (5) the differences between the test scores in 1973 and 1978 were insignificant, (6) the petitioner repeated both the first and second grades and spent one year in special education before he was socially promoted to the sixth grade, (7) petitioner's school records show no indication he ever went through the third, fourth, or fifth grades, (8) petitioner received almost uniformly failing grades in reading, spelling, and language during his years in the first and second grades, (9) petitioner's failing grades in language arts continued during his years in the sixth and seventh grades, (10) when tested at age fourteen, the petitioner scored no higher than the twenty eighth percentile in every academic skill or area tested, (11) the petitioner fell significantly below his grade level in every academic skill on which he was tested throughout his years in the SAISD, (12) despite repeating the ninth grade the petitioner earned only D's in English in that grade and withdrew from school in January, 1982 at age seventeen, (13) with the assistance of a clinical pathologist, he conducted a battery of reading tests on the petitioner on April 29, 1993, and determined the petitioner ranked in the lowest one percent of the adult population in terms of reading comprehension, (14) the petitioner's scores in oral language proficiency, vocabulary, verbal analysis, and memory were also in the first percentile, (15) based on his examination of the petitioner's school records and testing of the petitioner, he did not believe the petitioner could read or write English, (16) in his opinion, the petitioner was incapable of reading the written statement allegedly taken by Detective Saidler, (17) in his opinion, the petitioner could not understand the document prepared by Detective Saidler, (18) he did not believe the petitioner was capable of communicating effectively enough to have given the

confession allegedly recorded by Detective Saidler, and (19) in his opinion, the petitioner's written confession was not voluntarily given.<sup>25</sup>

On cross-examination and re-direct examination, Dr. Alexander clarified that (1) illiteracy and lack of intelligence are not the same thing, (2) if, in fact, the petitioner's IQ is in the thirties, the petitioner would be profoundly mentally retarded, (3) the petitioner was aware why Dr. Alexander was testing him, (4) a test subject's knowledge and awareness of the reasons why a test is being administered can be reflected in the subject's behavior during the test, (5) the petitioner was able to follow his directions during the testing process, (6) the petitioner is an experienced test taker who is disabled in the area of reading and related areas, (7) it is possible for a test subject to mislead a test examiner, (8) the petitioner's ability to read and his ability to comprehend are two different concepts, (9) it is possible the petitioner could have understood a paraphrase of his written statement, and the petitioner might have understood some parts of the statement, (10) the petitioner is fully capable of saying and comprehending the simple, declarative sentences contained in the written statement, (11) he is not suggesting the petitioner is incapable of confessing to the offense in question, (12) the petitioner is fully capable of recognizing the victim's photograph and of initialing same, (13) he did not read the written statement to the petitioner, (14) he never gave the petitioner the written statement or asked the petitioner to read same, (15) he did not attempt to test the petitioner's intelligence quotient ("IQ"), and (16) IQ is not necessarily linked with academic achievement or academic skills.<sup>26</sup>

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<sup>25</sup> See S.F. Trial, Volume XXXVI, testimony of Ronnie Alexander, at pp. 6194-6306.

<sup>26</sup> See S.F. Trial, Volume XXXVII, testimony of Ronnie Alexander, at pp. 6311-6407.

c. The Verdict at the Guilt-Innocence Phase

On July 17, 1993, after deliberating less than one full day, the jury returned its verdict, finding the petitioner guilty of capital murder.<sup>27</sup>

4. The Punishment Phase of Trial

a. The Prosecution's Case

(1) Misconduct While in Custody Awaiting Trial

At the punishment phase of trial, the prosecution called a trio of Bexar County Deputy Sheriffs who testified regarding incidents (1) on October 22, 1992, wherein the petitioner admitted he had broken a disposable razor, thereby committing a disciplinary infraction, while an inmate at the Bexar County Adult Detention Center ("BCADC")<sup>28</sup> and (2) on October 24, 1992, in which the petitioner repeatedly assaulted another BCADC inmate with his fists and attempted to assault the inmate again when guards intervened.<sup>29</sup>

(2) TDCJ Pen Packets

The prosecution also introduced the testimony of a fingerprint examiner who opined the petitioner's fingerprints matched those on three different Texas Department of Criminal Justice

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<sup>27</sup> See S.F. Trial, Volume XXXIX, at pp. 6556-58; and Transcript, volume two, at pp. 305-07. The petitioner's jury began its deliberations at approximately eleven a.m. on July 16, 1993, and sent out a note at approximately 9:50 the following morning indicating it had reached its verdict. *Id.* at pp. 300 & 305.

<sup>28</sup> See S.F. Trial, Volume XXXX, testimony of Steven James Carpenter, at pp. 6567-75; and testimony of Jimmy H. Velasquez, at pp. 6575-86.

<sup>29</sup> See S.F. Trial, Volume XXXX, testimony of Adrian L. Parra, at pp. 6586-96.

(“TDCJ”) pen packets, which were admitted into evidence as State’s exhibits 108, 109, and 110, and detailed petitioner’s lengthy criminal record.<sup>30</sup>

(3) Parole Revocations and Violations

Petitioner’s former parole officer testified that (1) the petitioner received shock probation in 1983 for burglary of a habitation and unauthorized use of a motor vehicle but probation was subsequently revoked when the petitioner was charged with possession of a stolen vehicle, (2) the petitioner was sent to state prison in Texas on April 6, 1987, and released on parole on May 2, 1991, (2) petitioner’s parole was subsequently revoked when he was charged with nine separate counts of burglary of a habitation, (3) despite those numerous violations, the petitioner was again released on parole later in 1991, (4) petitioner again violated the conditions of his parole in April, 1992, when he moved from his previous address without notifying his parole officer and ceased reporting monthly to his parole officer, (5) a parole violator warrant was issued for petitioner in May, 1992, (6) over a ten-year period, the petitioner was convicted of committing thirteen different first-degree felony offenses, (7) she read the petitioner his rights at petitioner’s preliminary parole revocation hearing on August 13, 1992, and the petitioner indicated he wanted to proceed with the preliminary hearing, (8) the petitioner also signed a form indicating he understood his rights in that proceeding as read to him by the parole hearing officer, (9) at the preliminary hearing, the petitioner appeared to be reading his rights off the form as the parole officer read them aloud, (10) after the parole officer read the petitioner his rights, the petitioner

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<sup>30</sup> See S.F. Trial, Volume XXXX, testimony of Vernon Ginn, at pp. 6610-21. State’s Exhibits 108, 109, and 110 appear in S.F. Trial, Volume XXXXII. State’s Exhibit 108 includes a notation sheet dated April 19, 1985, indicating the petitioner’s IQ was determined to be 86.

indicated he understood same and admitted the allegations against him regarding changing his residence, (11) the petitioner chose not to request a final revocation hearing, and (12) inmates are routinely administered IQ tests upon their admission to the TDCJ.<sup>31</sup>

(4) Past Violent Misconduct While Incarcerated

The prosecution also called a pair of TDCJ correctional officers who testified about an incident on August 7, 1989, in which the petitioner admitted he struck his cell mate with a weapon made of a belt tied to a combination lock.<sup>32</sup>

(5) Expert Testimony Re Petitioner's Intelligence

Finally, the prosecution called Dr. John C. Sparks, then-Director of the Bexar County Medical Psychiatric Department and a licensed psychiatrist, who testified that (1) Dr. Alexander had misinterpreted the meaning of the raw scores on the Wechsler Intelligence Scale tests for children included in petitioner's SAISD records because those raw scores must be cross-referenced against the test subject's chronological age, (2) when properly cross-referenced against the petitioner's chronological age of nine years and one month, the petitioner's January, 1973, raw scores reveal a verbal score of 81 and an overall IQ in the mid-eighties, (3) when properly cross-referenced with the petitioner's chronological age of fifteen, the petitioner's December, 1978, raw scores reveal a verbal score of 69 and a performance score of 82 with a composite IQ in the mid-seventies, (4) while the petitioner clearly cannot read very well, there is a difference between literacy and intelligence, (5) the TDCJ routinely tests incoming inmates using the Wechsler Adult

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<sup>31</sup> See S.F. Trial, Volume XXXX, testimony of Ruth Lynn Caballero, at pp. 6685-6736.

<sup>32</sup> See S.F. Trial, Volume XXXX, testimony of Dugan Woodard, at pp. 6737-48; and testimony of James Pate, at pp. 6749-55.

Intelligence Scale, (6) the petitioner's TDCJ records indicated that in March, 1984, the TDCJ determined the petitioner's IQ to be 75; in May, 1985, TDCJ determined the petitioner's IQ to be 86 and, in April, 1987, TDCJ determined petitioner's IQ was 93,<sup>33</sup> (7) the petitioner's higher scores on the adult version of Wechsler's Intelligence Scale could be accounted for based upon the petitioner's demonstrated poor reading ability and motivational factors, such as petitioner's desire to avoid being assigned to the TDCJ's highly restrictive units for the mentally retarded, (8) all of the IQ test scores included in the petitioner's school and prison records, when properly interpreted, indicate the petitioner consistently tested above the range for mentally retarded persons, (9) petitioner's test results on the Bender Gestalt measures indicate minimal brain dysfunction, (10) petitioner's grades in school were atrociously bad, (11) petitioner does not have an IQ in the thirties because such persons are barely able to care for themselves and would be unable to follow the directions on the various reading tests administered by Dr. Alexander, (12) the petitioner is not mentally retarded, and (13) mentally retarded persons can be more easily irritated than other persons and are fully capable of violence.<sup>34</sup>

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<sup>33</sup> Dr. Sparks pointed to State's Exhibit No. 108 as the source of his data on the May, 1985 score of 86 and State's Exhibit 36 as the source of the April, 1987 score of 93. See S.F. Trial, Volume XXXX, testimony of Dr. John C. Sparks, at pp. 6833-36. Dr. Sparks identified State's Exhibit No. 116 as the source of the March, 1984 IQ test score of 75. Id. at pp. 6842-43.

<sup>34</sup> See S.F. Facts, Volume XXXX, testimony of Dr. John C. Sparks, at pp. 6820-63. Dr. Sparks gave much more detailed testimony regarding the true nature of the petitioner's IQ and the proper method for construing petitioner's test scores at a hearing held outside the jury's presence. See S.F. Trial, Volume XXXX, testimony of Dr. John C. Sparks, at pp. 6768-6800. At the hearing outside the jury's presence, Dr. Sparks was permitted to refer to the petitioner's records from the BCADC, as well as additional materials which were excluded from consideration during his testimony before the jury because the prosecution had failed to timely disclose some of those records to petitioner's trial counsel.

b. The Defense's Case

Petitioner's trial counsel called the petitioner's father and the petitioner's common law wife to testify that (1) the petitioner experienced consistent problems reading while in school and, despite the efforts of his family and even special tutors, was unable to learn how to read and was eventually socially promoted but never graduated from high school, (2) his father taught the petitioner how to work on cars, (3) the petitioner grew up in a stable, loving family, (4) the petitioner loves his mother and his three daughters very much, (5) the petitioner's father and wife have to assist the petitioner in filling out job applications, (6) the petitioner had been employed as a cook's helper and a dish washer in both restaurants and a hotel, and (7) the petitioner does not admit to others he cannot read.<sup>35</sup>

c. The Verdict

On July 20, 1993, after deliberating less than nine hours, the jury returned its verdict, finding beyond a reasonable doubt that (1) there was a probability the petitioner would commit criminal acts of violence that would constitute a continuing threat to society and (2) taking into consideration all of the evidence, including the circumstances of the offense and the petitioner's

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<sup>35</sup> See S.F. Trial, Volume XXXXI, testimony of David Cockrell, at pp. 6868-97; and testimony of Rene Cockrell, at pp. 6898-6917. On cross-examination, the petitioner's father admitted the petitioner's family had been hurt when it learned of the petitioner's criminal convictions. Id., testimony of David Cockrell, at pp. 6893-94. Likewise, petitioner's common law wife admitted she had been pregnant with the petitioner's children at the time the petitioner was arrested the first time and again when the petitioner committed a string of burglaries. Id., testimony of Rene Cockrell, at pp. 6908 and 6915. Petitioner's common law wife testified she was unaware of the petitioner's cocaine habit. Id., testimony of Rene Cockrell, at p. 6910.

character, background, and personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment.<sup>36</sup>

5. Direct Appeal

Petitioner appealed, presenting some fifty-four points of error on direct appeal. In a published opinion issued September 11, 1996, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence of death.<sup>37</sup> The United States Supreme Court denied petitioner's petition for writ of certiorari on April 14, 1997.<sup>38</sup>

6. State Habeas Corpus Proceeding

a. The State Habeas Application and Claims for Relief

On July 21, 1997, petitioner filed an application for state habeas corpus relief in which he argued that (1) both his trial and appellate counsel rendered ineffective assistance in myriad and sundry ways, (2) the state trial court erred in admitting prejudicial evidence regarding the fact the

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<sup>36</sup> See S.F. Trial, Volume XXXXI, at pp. 6969-71; and Transcript, volume two, at pp. 318-20. The jury began its deliberations on the punishment phase of trial at approximately 12:20 p.m. on July 20, 1993, and returned its verdict at approximately 9:11 that same date. See Transcript, volume two, at pp. 313 & 317.

<sup>37</sup> See Cockrell v. State, 933 S.W.2d 73 (Tex. Crim. App. 1996), cert. denied, 520 U.S. 1173 (1997). The unusually large number of points of error contained in petitioner's appellant's brief resulted from the fact petitioner's appellate counsel raised almost two dozen points of error complaining about trial court rulings on comments made by the prosecution during voir dire, as well as points attacking numerous prosecutorial comments during voir dire to which no objection was made by defense counsel. The Texas Court of Criminal Appeals summarily dismissed many of these points of error based on petitioner's failure to make a timely objection thereto and the fact the petitioner failed to exhaust his peremptory challenges during jury selection.

<sup>38</sup> See Cockrell v. Texas, 520 U.S. 1173 (1997).

petitioner was arrested for an alleged parole violation prior to his giving his confession, and (3) petitioner's right to remain free from compelled self-incrimination had been violated.<sup>39</sup>

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<sup>39</sup> See Documents filed in petitioner's state habeas corpus proceeding (henceforth "State Habeas Records"), at pp. 1-19. More specifically, petitioner argued that (1) his trial counsel rendered ineffective assistance by (a) failing to present expert psychiatric testimony regarding the petitioner's future dangerousness at the punishment phase of trial, (b) failing to have the petitioner examined by a psychiatric expert, (c) failing to rebut the testimony of Dr. Sparks regarding petitioner's future dangerousness, (d) failing to object to the admission of petitioner's written statement, (e) failing to assert on direct appeal that the Texas Court of Criminal Appeals was prohibited by constitutional *ex post facto* principles from announcing a new rule of procedure in its opinion addressing petitioner's direct appeal, (f) failing to object to the prosecution's references to petitioner's expert as "court-appointed," (g) failing to object to the admission of evidence regarding the petitioner's prior convictions, (h) failing to use all the defense's available peremptory challenges, (i) acquiescing in a jury charge that informed the jury the petitioner would be eligible for release on parole if sentenced to a term of life imprisonment, (j) failing to call the petitioner's father and brother to testify at the guilt-innocence phase of trial regarding the petitioner's illiteracy, (k) a conflict of interest existed by virtue of the fact the petitioner's trial counsel received a fixed fee for their services, (l) failing to present mitigating evidence regarding the petitioner's mental impairment, (m) failing to request, or object to the state trial court's failure to *sua sponte* order a competency hearing after Dr. Alexander testified the petitioner had an IQ of 31, and (n) failing to object to the prosecution's inflammatory remark regarding the jury having the blood of the victim on its hands, (2) his appellate counsel rendered ineffective assistance by failing to raise points of error attacking (a) the admission of petitioner's written statement, (b) the appellate court's adoption of a new rule of procedure, (c) the admission of petitioner's prior felony convictions, (d) the performance of trial counsel in not objecting to certain comments made by the prosecution during voir dire, and (e) the jury instruction regarding parole eligibility, (3) the state trial court erred in admitting evidence establishing that the petitioner was arrested based upon an alleged parole violation, and (4) petitioner's right to be free from compelled self-incrimination was violated in unspecified ways. With regard to petitioner's final claim for state habeas corpus relief listed above, petitioner made an assertion on page 5 of his state habeas corpus application that his right to remain free from compelled self-incrimination was somehow violated but petitioner failed to offer any specific facts to support that claim in the remainder of his application and failed to present any evidence supporting that assertion during the two-day evidentiary hearing held in December, 1997.

b. The Evidentiary Hearing

On December 1 and 2, 1997, the state trial court held an evidentiary hearing on petitioner's claims for state habeas corpus relief.<sup>40</sup>

(1) Petitioner's Witnesses

During the first day of the evidentiary hearing, i.e., on December 1, 1997, the petitioner testified that (1) he only signed his written statement because he believed they were papers relating to his parole, (2) he did not read the statement before he signed it and did not know what it was, (3) all of his family members were aware of the fact he could not read, (4) his attorneys advised him against testifying at trial, made no effort to obtain the services of an expert on mitigating evidence, and did not obtain the services of a psychiatric expert to testify in mitigation at the punishment phase of petitioner's trial, (5) he did not kill Sandra Deptawa, (6) he does not know who killed her or who robbed her, (7) he obtained some of Sandra Deptawa's property from a gang member, (8) he never confessed to killing or robbing Sandra Deptawa, (9) he was uncertain when Detective Saidler read him his rights, (10) he was "lit up on cocaine" and intoxicated while he was in Saidler's office, (11) another officer read him his rights at his apartment, but the petitioner did not pay attention to same and did not understand same because yet another officer was also talking to him at the time his rights were read to him, (12) he was not forced to sign his

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<sup>40</sup> Three volumes relating to the hearing held in the course of petitioner's state habeas corpus proceeding appear among the records submitted to this court by respondent. The first such volume consists of an index to the testimony given during the two-day evidentiary hearing. The second volume reflects proceedings held December 1, 1997. The third volume reflects the testimony given on December 2, 1997. Because different page sequences appear in volumes two and three, this Court will refer to both volume and page number when identifying testimony given during that two-day hearing.

three-page written statement, (13) his trial counsel did not explain things to him when petitioner had a question during trial, (14) he did not understand unspecified aspects of his trial, (15) if he had been called to testify at the guilt-innocence phase of trial, he would have denied any knowledge of the crime, (16) if he had been offered a plea bargain, he would not have accepted it because he did not commit this crime, (17) if he had been called to testify at the punishment phase of his trial, he would have continued to assert that he did not commit the crime, (18) unspecified members of his family could have furnished him with an alibi if they had been called to testify at the guilt-innocence phase of trial, (19) he did sell a handgun to Marvin Leal, but he had previously obtained that gun from Kelly Wright, (20) he made his attorney aware that he could not read and he testified to as much during a pretrial hearing held in his case, (21) his attorneys advised him it was his choice whether to testify at trial but they also advised him against testifying because the prosecution could have used petitioner's many prior convictions to impeach him, (22) despite this, he was unaware he had a right to testify on his own behalf, (23) he wanted the jury to believe that a term of life imprisonment meant life without the possibility of parole, (24) he never had possession of Sandra Deptawa's car, and (25) at some point, Detective Saidler did read the petitioner his rights.<sup>41</sup>

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<sup>41</sup> See Statement of Facts from petitioner's state habeas corpus hearing, volume one, proceedings, December 1, 1997 (henceforth "S.F. State Habeas Hearing"), Volume Two, testimony of Timothy Cockrell, at pp. 11-81.

Petitioner's sister, Manida Davis, testified that (1) the petitioner could not read or write, (2) she assisted the petitioner in completing job applications, (3) the petitioner was not violent, and (4) she was unaware of the petitioner's cocaine habit.<sup>42</sup>

Petitioner's father, David Cockrell, testified that (1) the petitioner cannot read or write, (2) he obtained the petitioner's school records for petitioner's trial counsel, (3) the petitioner had a good childhood, was never deprived of anything, and was never the victim of sexual or physical abuse, (4) he was unaware of the petitioner's cocaine habit and never used drugs himself, and (5) the petitioner took his wife and children to church.<sup>43</sup>

(2) The State's Witnesses

Petitioner's lead trial counsel, attorney John Hrnecir, testified that (1) he was able to communicate adequately with the petitioner, (2) the petitioner seemed to understand when counsel spoke with him, (3) the petitioner did not express any unusual lack of understanding regarding the proceedings, (4) he was unaware of any facts showing the petitioner was incompetent to stand trial, (5) nothing happened during his representation of the petitioner that led him to believe the petitioner was not competent to stand trial, (6) the petitioner insisted that, while he had helped move the victim, he had no role in the crime, (7) he and co-counsel consulted with the petitioner's family, teachers, and counselors and were well aware the petitioner could not read, (8) the petitioner never furnished his counsel with the names of any witnesses who could have furnished exculpatory testimony at the guilt-innocence phase of trial, (9) he was aware of no defenses that

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<sup>42</sup> See S.F. State Habeas Hearing, Volume Two, testimony of Manida Davis, at pp. 82-89.

<sup>43</sup> See S.F. State Habeas Hearing, Volume Two, testimony of David Cockrell, at pp. 90-101.

could have been asserted and supported by evidence at the guilt-innocence phase of trial, (10) on numerous occasions, he discussed with petitioner the fact the petitioner had the right to testify if he so desired, (11) he advised petitioner against testifying at the guilt-innocence phase of trial because the prosecution could have used the petitioner's lengthy criminal record to impeach the petitioner, (12) he advised the petitioner against testifying at the punishment phase of trial because the petitioner remained insistent he had not committed the crime and counsel were concerned the jury might construe such testimony as a refusal by petitioner to accept responsibility for the offense, (13) the decision on whether to testify was ultimately made by the petitioner, (14) counsel did not investigate, develop, or present evidence regarding the petitioner's cocaine abuse during the punishment phase of trial because the petitioner adamantly denied he used drugs and testimony regarding self-induced cocaine-related behavior would have highlighted additional criminal conduct on the part of the petitioner, (15) the petitioner never suggested any additional mitigating evidence to counsel, (16) petitioner's trial counsel had the assistance of a court-appointed investigator and a court-appointed expert, and nothing prevented said counsel from investigating or developing any evidence, (17) counsel believed it was advantageous to advise petitioner's jury the petitioner would have to serve a very long term of imprisonment before becoming eligible for release on parole because they did not want the jury to assume the petitioner could be free in two-to-ten years if given a life term, (18) petitioner never said or did anything to indicate he was dissatisfied with the performance of his trial counsel, (19) counsel did not consult with psychiatric experts regarding the issue of petitioner's future dangerousness, (20) counsel did not consult with

other types of experts on the subject of mitigation, and (21) he did not believe Dr. Alexander's testimony suggesting the petitioner had a very low IQ warranted a competency hearing.<sup>44</sup>

On the second day of the hearing, petitioner's co-counsel, attorney Gordon Armstrong, testified that (1) the petitioner never indicated any confusion regarding the proceedings against him, (2) the petitioner appeared to understand what was going on, (3) he was never aware of any evidence showing the petitioner was incompetent to stand trial, (4) the petitioner never expressed dissatisfaction with counsel, (5) trial counsel discussed with the petitioner his right to testify at both phases of trial and the upsides and down-sides of the petitioner testifying, (6) the petitioner chose not to testify after consulting with counsel, who advised petitioner it was in petitioner's best interest not to testify, (7) the petitioner never indicated he wanted a plea bargain, (8) trial counsel never refused to call any witness suggested by the petitioner, (9) counsel chose not to have petitioner evaluated by a psychiatric expert after consulting with Dr. Alexander, (10) counsel did not consult with other types of experts regarding the issue of future dangerousness, (11) they did not call the petitioner's family to testify at the guilt-innocence phase of trial regarding the petitioner's illiteracy because they had Dr. Alexander's testimony as well as the petitioner's school records, and (12) evidence detailing the petitioner's history of drug use would have had both mitigating and aggravating qualities if introduced at the punishment phase of trial.<sup>45</sup>

Finally, prosecuting attorney Mike Cohen testified that (1) he never saw anything to indicate the petitioner was incompetent to stand trial, (2) he saw the petitioner conferring with

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<sup>44</sup> See S.F. State Habeas Hearing, Volume Two, testimony of John Hrnecir, at pp. 110-81.

<sup>45</sup> See S.F. State Habeas Hearing, Volume Three, testimony of Gordon Armstrong, at pp. 4-65.

counsel during voir dire and throughout the trial, and (3) the petitioner appeared to have a rational understanding of the proceeding.<sup>46</sup>

c. State Trial Court Findings and Conclusions

In an Order issued May 24, 1999,<sup>47</sup> the state trial court concluded, in pertinent part, that (1) the petitioner failed to present any evidence suggesting what additional mitigating evidence could have been presented had petitioner's trial counsel consulted with psychiatric or other mitigation experts, (2) petitioner failed to present any evidence showing how a mental health examination or evaluation of the petitioner would have benefitted the petitioner at trial, (3) petitioner's trial counsel reasonably concluded that evidence showing the petitioner had engaged in cocaine-induced behavior would have had potential drawbacks, including the fact the petitioner refused to admit to same and unequivocally denied any involvement in the offense, (4) petitioner's trial counsel employed a reasonable strategic gambit when they argued the petitioner's written statement had been involuntary because the petitioner could not read and erroneously believed his statement related to his parole, (5) the petitioner's status as a parolee was inextricably intertwined with this defensive theory, (6) petitioner's trial counsel employed a reasonable strategy when they sought to advise the jury the petitioner would have to serve a lengthy prison term before becoming eligible for release on parole if sentenced to serve a term of life imprisonment, (7) petitioner's trial

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<sup>46</sup> See S.F. State Habeas Hearing, Volume Three, testimony of Mike Cohen, at pp. 65-71.

<sup>47</sup> An incomplete copy of the state trial court's Order issued May 24, 1999, appears among the petitioner's State Habeas Records, at pp. 81-138. That copy is missing pages 20-22 of the state trial court's Order. Fortunately, a complete version of that Order also appears as a separate document among the records relating to the petitioner's state habeas corpus proceeding (henceforth "Trial Court Order in State Habeas Corpus Proceeding").

counsel employed reasonable strategy in deciding to present evidence regarding the petitioner's illiteracy through Dr. Alexander, without calling the petitioner's family to corroborate what was painfully obvious from even a cursory review of petitioner's school records, (8) petitioner failed to present any evidence showing his trial counsel ever represented conflicting interests, (9) the petitioner failed to introduce any evidence showing the petitioner suffered from cocaine-induced psychosis, (10) Dr. Alexander's interpretation of the raw scores from petitioner's childhood IQ tests as indicating the petitioner had an IQ in the thirties were shown to be erroneous through the trial testimony of Dr. Sparks who opined the petitioner was not mentally retarded, (11) based upon the trial court's first-hand observations (including those made during the petitioner's coherent testimony at a pretrial hearing), the petitioner never manifested any outward indications he was incompetent, and (12) because there was no evidence showing the petitioner was incompetent to stand trial, petitioner's trial counsel did not render ineffective assistance by failing to request a competency hearing.<sup>48</sup> Based on the foregoing, the state trial court recommended that state habeas corpus relief be denied.

d. Final Ruling

On September 22, 1999, the Texas Court of Criminal Appeals denied petitioner's state habeas corpus application in an unpublished order in which it expressly and specifically adopted the findings of fact and conclusions of law issued by the state trial court.<sup>49</sup>

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<sup>48</sup> See State Habeas Records, at pp. 81-138; Trial Court Order in State Habeas Proceeding, at pp. 1-61.

<sup>49</sup> See Ex parte Timothy Cockrell, No. 41,755-01 (Tex. Crim. App. September 22, 1999).

B. Procedural History

On February 25, 2000, petitioner filed his petition for federal habeas corpus relief herein, in which he argued that (1) his trial counsel rendered ineffective assistance by failing to present mitigating evidence and evidence relating to the issue of future dangerousness,<sup>50</sup> (2) the fixed fee arrangement under which petitioner's trial counsel were appointed created an inherent conflict of interest which prevented petitioner's trial counsel from seeking a plea bargain on petitioner's behalf,<sup>51</sup> (3) petitioner's trial counsel rendered ineffective assistance by failing to object to the state trial court's failure to order a competency hearing,<sup>52</sup> and (4) petitioner's trial counsel rendered ineffective assistance by failing to object to that portion of the prosecution's closing argument at the punishment phase of trial in which the prosecution urged the jury not to feel sympathy for the petitioner and not to allow the victim's blood to remain on the jury's hands.<sup>53</sup>

On May 26, 2000, respondent filed a motion for summary judgment in which he argued that (1) petitioner failed to introduce any evidence showing what additional mitigating evidence was available for petitioner's trial counsel to present at the punishment phase of trial, (2) the state habeas court reasonably concluded petitioner's trial counsel acted in a professionally reasonable

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<sup>50</sup> More specifically, petitioner complains his trial counsel failed to (1) have petitioner's IQ tested, (2) rebut Dr. Sparks' testimony regarding the petitioner's IQ, (3) have petitioner's father plead with the jury to spare the petitioner's life, (4) investigate cocaine-induced psychosis, (5) secure expert assistance regarding the issue of future dangerousness, and (6) adequately investigate the petitioner's background and intelligence. See Petitioner's Petition for Writ of Habeas Corpus, filed February 25, 2000, docket entry no. 8 (henceforth "Petition"), at pp. 22-40.

<sup>51</sup> See Petition, at pp. 40-43.

<sup>52</sup> See Petition, at pp. 43-47.

<sup>53</sup> See Petition, at pp. 47-50.

manner in choosing not to present evidence showing the petitioner's murder of Sandra Deptawa was the product of cocaine-induced psychosis, (3) petitioner failed to exhaust his conflict of interest claim, which is likewise unsupported by any evidence showing that an actual conflict of interest ever existed as a result of any alleged financial constraints upon petitioner's trial counsel, (4) there was no evidence indicating the petitioner was not competent to stand trial, (5) there was nothing improper in the prosecution's closing jury arguments at the punishment phase of trial, and (6) petitioner's numerous complaints of ineffective assistance do not satisfy the prejudice prong of Strickland.<sup>54</sup>

On June 9, 2000, petitioner filed a response to respondent's motion for summary judgment in which petitioner argued, in pertinent part, that (1) he did exhaust state remedies on his conflict of interest claim and (2) the Texas Court of Criminal Appeals applied the wrong "prejudice" test in evaluating petitioner's ineffective assistance claims.<sup>55</sup>

## II. Analysis and Authorities

### A. The AEDPA Standard of Review

Because petitioner filed his federal habeas corpus action after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court's review of petitioner's claims for federal habeas corpus relief is governed by the AEDPA.<sup>56</sup>

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<sup>54</sup> See Respondent's Answer and Motion for Summary Judgment, filed May 26, 2000, docket entry no. 13.

<sup>55</sup> See docket entry no. 14.

<sup>56</sup> See Penry v. Johnson, 532 U.S. 782, 792 (2001).

Under the AEDPA standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.<sup>57</sup>

The Supreme Court has concluded the "contrary to" and "unreasonable application" clauses of Title 28 U.S.C. Section 2254(d)(1) have independent meanings.<sup>58</sup>

Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.<sup>59</sup>

Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but

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<sup>57</sup> See Williams v. Taylor, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d)(1).

<sup>58</sup> See Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843, 1850 (2002); Penry v. Johnson, 532 U.S. at 792; Williams v. Taylor, 529 U.S. at 404-05.

<sup>59</sup> See Bell v. Cone, 122 S. Ct. at 1850; Penry v. Johnson, 532 U.S. at 1918 ("A state court decision will be 'contrary to' our clearly established precedent if the state court either 'applies a rule that contradicts the governing law set forth in our cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'"); Williams v. Taylor, 529 U.S. at 404-06.

unreasonably applies that principle to the facts of the petitioner's case.<sup>60</sup> A federal court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable."<sup>61</sup> The focus of this inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable and an "unreasonable" application is different from a merely incorrect one.<sup>62</sup>

The AEDPA significantly restricts the scope of federal habeas review of state court fact findings, requiring a petitioner challenging state court factual findings to establish by clear and convincing evidence the state court's findings were erroneous.<sup>63</sup>

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<sup>60</sup> See Woodford v. Visciotti, 123 S. Ct. 357, 360 (2002); Bell v. Cone, 122 S. Ct. at 1850; Penry v. Johnson, 532 U.S. at 792; Williams v. Taylor, 529 U.S. at 407-08.

In Williams, the Supreme Court expressly reserved for another day the issue of how federal habeas courts should determine whether a state court erroneously extended a legal principle into a new realm or erroneously refused to extend existing legal principle into a new area. See Williams v. Taylor, 529 U.S. at 408-09.

<sup>61</sup> See Woodford v. Visciotti, 123 S. Ct. at 360; Penry v. Johnson, 532 U.S. at 793; Williams v. Taylor, 529 U.S. at 409-11.

<sup>62</sup> See Woodford v. Visciotti, 123 S. Ct. at 360; Bell v. Cone, 122 S. Ct. at 1850; Penry v. Johnson, 532 U.S. at 793; Williams v. Taylor, 529 U.S. at 410-11.

<sup>63</sup> See Foster v. Johnson, 293 F.3d 766, 776 (5th Cir.), cert. denied, 123 S. Ct. 625 (2002); Rudd v. Johnson, 256 F.3d 317, 319 (5th Cir.), cert. denied, 534 U.S. 1001 (2001) ("The presumption is particularly strong when the state habeas court and the trial court are one and the same."); Dowthitt v. Johnson, 230 F.3d 733, 741 (5th Cir. 2000), cert. denied, 532 U.S. 915 (2001); Miller v. Johnson, 200 F.3d 274, 281 (5th Cir.), cert. denied, 531 U.S. 849 (2000) (holding state court fact findings are presumed correct and the petitioner has the burden of rebutting the presumption by clear and convincing evidence); Hicks v. Johnson, 186 F.3d 634, 637 (5th Cir. 1999), cert. denied, 528 U.S. 1132 (2000) (holding the AEDPA requires federal habeas courts to accept as correct state court factual determinations unless the petitioner rebuts same by clear and convincing evidence); Morris v. Cain, 186 F.3d 581, 583 (5th Cir. 1999); Davis v. Johnson, 158 F.3d 806, 812 (5th Cir. 1998), cert. denied, 526 U.S. 1074 (1999); Jackson v. Johnson, 150 F.3d 520, 524 (5th Cir. 1998), cert. denied, 526 U.S. 1041 (1999); Williams v. Cain, 125 F.3d 269, 277 (5th Cir. 1997), cert. denied, 525 U.S. 859 (1998) (recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless

With the foregoing principles in mind, this Court turns to the merits of petitioner's claims for federal habeas corpus relief.

B. Ineffective Assistance - The Constitutional Standard

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of Strickland v. Washington:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>64</sup>

In order to establish his counsel's performance was constitutionally deficient, a convicted defendant must show counsel's representation "fell below an objective standard of reasonableness."<sup>65</sup> In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of

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rebutted by 'clear and convincing evidence'); Hernandez v. Johnson, 108 F.3d 554, 558 & n.4 (5th Cir.), cert. denied, 522 U.S. 984 (1997) (holding that under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"); 28 U.S.C. § 2254(e)(1).

<sup>64</sup> Strickland v. Washington, 466 U.S. 668, 687 (1984).

<sup>65</sup> Williams v. Taylor, 529 U.S. 362, 390-91 (2000); Darden v. Wainwright, 477 U.S. 168, 184 (1986); Strickland v. Washington, 466 U.S. at 687-88.

reasonable professional assistance.<sup>66</sup> The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight.<sup>67</sup> It is strongly presumed that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.<sup>68</sup> An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law, are virtually unchallengeable.<sup>69</sup> Counsel is required neither to advance every non-frivolous argument nor to investigate every conceivable matter inquiry into which could

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<sup>66</sup> See Strickland v. Washington, 466 U.S. at 687-91.

<sup>67</sup> See Lockhart v. Fretwell, 506 U.S. 364, 372 (1993); Burger v. Kemp, 483 U.S. 776, 789 (1987); Strickland v. Washington, 466 U.S. at 689.

<sup>68</sup> See Strickland v. Washington, 466 U.S. at 690.

<sup>69</sup> See Jones v. Jones, 163 F.3d 285, 300 (5th Cir. 1998), cert. denied, 528 U.S. 895 (1999); Ransom v. Johnson, 126 F.3d 716, 721 (5th Cir.), cert. denied, 522 U.S. 944 (1997); Green v. Johnson, 116 F.3d 1115, 1122 (5th Cir. 1997) ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."); Boyle v. Johnson, 93 F.3d 180, 187-88 (5th Cir. 1996), cert. denied, 519 U.S. 1120 (1997) (holding that an attorney's decision not to pursue a mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies); West v. Johnson, 92 F.3d 1385, 1406-09 (5th Cir. 1996), cert. denied, 520 U.S. 1242 (1997) (holding that a trial counsel's failure to conduct further investigation into the defendant's head injury and psychological problems was reasonable where interviews with the defendant and the defendant's family failed to produce any helpful information); Bryant v. Scott, 28 F.3d 1411, 1435 (5th Cir. 1994) (citing Strickland v. Washington, 466 U.S. at 691); Andrews v. Collins, 21 F.3d at 623 (holding that counsel acted reasonably in failing to further pursue the defendant's mental capacity or background where counsel had no reason to believe that further investigation would be useful).

be classified as non-frivolous.<sup>70</sup> A criminal defense counsel is not required to exercise clairvoyance during the course of a criminal trial.<sup>71</sup> Likewise, the Sixth Amendment does not require that counsel do what is impossible or unethical; if there is no bona fide defense to the charge, counsel is not required to create one.<sup>72</sup>

The proper standard for evaluating counsel's performance under the Sixth Amendment is "reasonably effective assistance."<sup>73</sup> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."<sup>74</sup> "Accordingly, any deficiencies in counsel's performance must be prejudicial to

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<sup>70</sup> See Neal v. Cain, 141 F.3d 207, 214-15 (5th Cir. 1998) (holding petitioner's complaints regarding counsel's failure to raise specific defenses did not satisfy prejudice prong of Strickland where proposed defenses were without merit); Sones v. Hargett, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point."); United States v. Gibson, 55 F.3d 173, 179 (5th Cir. 1995) ("Counsel is not required by the Sixth Amendment to file meritless motions."); Smith v. Collins, 977 F.2d 951, 960 (5th Cir. 1992), cert. denied, 510 U.S. 829 (1993) ("The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources."); Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections."); Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985) (holding that defense counsel is not required to investigate everyone whose name is mentioned by the defendant); Murray v. Maggio, 736 F.2d 279, 283 (5th Cir. 1984) ("Counsel is not required to engage in the filing of futile motions.")

<sup>71</sup> See Sharp v. Johnson, 107 F.3d 282, 290 n.28 (5th Cir. 1997) (citing Garland v. Maggio, 717 F.2d 199, 207 (5th Cir. 1983)) (holding that clairvoyance is not a required attribute of effective representation); see also Lackey v. Johnson, 116 F.3d 149, 152 (5th Cir. 1997) (holding that trial counsel was not ineffective for failing to discover evidence about which the defendant knew but withheld from his counsel).

<sup>72</sup> See United States v. Cronin, 466 U.S. 648, 656 n.19 (1984).

<sup>73</sup> Strickland v. Washington, 466 U.S. at 687.

<sup>74</sup> Strickland v. Washington, 466 U.S. at 691.

the defense in order to constitute ineffective assistance under the Constitution."<sup>75</sup> In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>76</sup> "A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>77</sup> The prejudice prong of Strickland focuses on whether counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair; unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.<sup>78</sup>

C. Failure to Present Mitigating Evidence

1. The Claims

Petitioner argues his trial counsel rendered ineffective assistance by failing to (1) have petitioner's IQ tested, (2) rebut Dr. Sparks' testimony regarding the petitioner's IQ, (3) have petitioner's father plead with the jury to spare the petitioner's life, (4) investigate cocaine-induced psychosis, (5) secure expert assistance regarding the issue of future dangerousness, and (6) adequately investigate the petitioner's background and intelligence.<sup>79</sup>

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<sup>75</sup> Strickland v. Washington, 466 U.S. at 692.

<sup>76</sup> Williams v. Taylor, 529 U.S. at 391; Strickland v. Washington, 466 U.S. at 694.

<sup>77</sup> Woodford v. Visciotti, 123 S. Ct. 357, 359 (2002) ( quoting Strickland v. Washington, 466 U.S. at 694).

<sup>78</sup> Williams v. Taylor, 529 U.S. at 393 n.17; Strickland v. Washington, 466 U.S. at 692.

<sup>79</sup> See Petition, at pp. 22-40.

2. AEDPA Review of Failure to Investigate and Present Mitigating Evidence Complaints

As pointed out by the state trial court in its findings of fact and conclusions of law issued after a two-day hearing in petitioner's state habeas corpus proceeding, the petitioner failed to present the state habeas court with any evidence showing precisely what additional mitigating evidence (regarding the issue of future dangerousness or any other issue submitted at the punishment phase of petitioner's capital murder trial) was available at the time of the petitioner's trial which could have been presented to the jury had petitioner's trial counsel more thoroughly investigated petitioner's background and developed same. This finding and the state trial court's conclusions regarding petitioner's wholesale failure to satisfy the prejudice prong of Strickland are fully supported by the evidence before that court and fully consistent with clearly established federal constitutional law.

An attorney's failure to investigate the case against the defendant and to interview witnesses can support a finding of ineffective assistance.<sup>80</sup> However, in order to establish that counsel was rendered ineffective by virtue of a failure to investigate the case against a defendant or to discover and present evidence, a convicted defendant must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed, what evidence would have resulted from that investigation, and how such would have altered the outcome of the case.<sup>81</sup> Furthermore, when a trial counsel's decision not to pursue further

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<sup>80</sup> See Moore v. Johnson, 194 F.3d 586, 608 & 616 (5th Cir. 1999); Bryant v. Scott, 28 F.3d at 1435.

<sup>81</sup> See Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir.), cert. denied, 525 U.S. 952 (1998); Anderson v. Collins, 18 F.3d 1208, 1221 (5th Cir. 1994); Nelson v. Hargett, 989 F.2d

investigation into a potential defense or into an area of potential mitigating evidence is based on investigation and consultation with the defendant which leads the attorney to believe further investigation would be fruitless, that decision may not be challenged as unreasonable.<sup>82</sup> The extent of an attorney's investigation into an area must be viewed in the context of the defendant's cooperation with the attorney's investigation and with a heavy measure of deference to counsel's judgments.<sup>83</sup> Complaints of uncalled witnesses are not favored in federal habeas review because allegations regarding the testimony of such witnesses are largely speculative.<sup>84</sup>

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847, 850 (5th Cir. 1993); United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989); Lockhart v. McCotter, 782 F.2d 1275, 1282-83 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); Alexander v. McCotter, 775 F.2d 595, 603 (5th Cir. 1985); Schwander v. Blackburn, 750 F.2d 494, 499-500 (5th Cir. 1985); Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983).

<sup>82</sup> See Carter v. Johnson, 131 F.3d at 465; Boyle v. Johnson, 93 F.3d at 187-88; West v. Johnson, 92 F.3d at 1406-09; Andrews v. Collins, 21 F.3d at 623.

<sup>83</sup> See Carter v. Johnson, 131 F.3d at 463; Randle v. Scott, 43 F.3d 221, 225 (5th Cir.), cert. denied, 515 U.S. 1108 (1995) (holding that trial counsel was not ineffective for failing to investigate the validity of the defendant's prior conviction where the defendant was aware that the prior conviction had been reversed but failed to disclose same to his counsel and, instead, instructed his counsel to cease investigation into the matter so as to expedite the defendant's entry of a guilty plea). However, an attorney who is aware of potential mitigating evidence is obligated to investigate the existence of such evidence beyond merely communicating with the defendant. Ransom v. Johnson, 126 F.3d at 723.

<sup>84</sup> Evans v. Cockrell, 285 F.3d 370, 377 (5th Cir. 2002); Sayre v. Anderson, 238 F.3d 631, 635-36 (5th Cir. 2001).

This point is particularly germane to petitioner's first wave of ineffective assistance claims herein because the petitioner offered the state habeas court no evidence at the two-day evidentiary hearing held in December, 1997, that suggested what helpful testimony a psychiatric expert or an expert on mitigating evidence could have furnished to petitioner's trial counsel in 1993 had said counsel retained such experts to assist in petitioner's defense at trial.

Because the Strickland opinion itself dealt with a sentencing proceeding, the two-part test applies to sentencing proceedings.<sup>85</sup> In a capital sentencing proceeding, the prejudice analysis focuses on whether there is a reasonable probability that, absent counsel's errors, a life sentence would have been imposed.<sup>86</sup> The failure to present mitigating evidence during the sentencing phase of a capital trial is not, *per se*, deficient performance.<sup>87</sup> Counsel does, however, have a duty to make a reasonable investigation into available mitigating evidence or to make a reasonable decision that makes particular investigations unnecessary.<sup>88</sup> Counsel is also obligated to investigate beyond merely communicating with his client once counsel becomes aware of the possible existence of potentially mitigating evidence.<sup>89</sup>

While petitioner faults his trial counsel's failures to secure an IQ test for petitioner, at the evidentiary hearing held in petitioner's state habeas corpus proceeding, petitioner offered no evidence suggesting what an IQ test performed at or near the time of petitioner's capital murder

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<sup>85</sup> See Burger v. Kemp, 483 U.S. 776, 788-96 (1987); Green v. Johnson, 116 F.3d at 1122; Belyeu v. Scott, 67 F.3d at 540-42 (applying both prongs of the Strickland test to ineffective assistance claims regarding the sentencing phase of a capital murder trial); Andrews v. Collins, 21 F.3d at 623-25; Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993).

<sup>86</sup> See Strickland v. Washington, 466 U.S. at 695; Carter v. Johnson, 131 F.3d at 463; Ransom v. Johnson, 126 F.3d at 723; Green v. Johnson, 116 F.3d at 1122 (holding that the proper inquiry is whether the defendant has demonstrated a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel); Belyeu v. Scott, 67 F.3d at 538.

<sup>87</sup> See Ransom v. Johnson, 126 F.3d at 723; Williams v. Cain, 125 F.3d at 277; West v. Johnson, 92 F.3d at 1408.

<sup>88</sup> See Williams v. Cain, 125 F.3d at 277 (citing Strickland v. Washington, 466 U.S. at 691).

<sup>89</sup> Ransom v. Johnson, 126 F.3d at 723.

trial might have revealed.<sup>90</sup> Likewise, while petitioner complains his trial counsel failed to rebut Dr. Sparks' testimony regarding petitioner's IQ, petitioner offered no evidence to the state courts in the course of petitioner's state habeas corpus proceeding establishing it was possible to rebut Dr. Sparks' testimony regarding the proper method for interpreting raw scores on the Wechsler Intelligence Scale for Children or any of Dr. Sparks' other opinions.<sup>91</sup> While petitioner complains his trial counsel failed to secure the assistance of a psychiatric expert or a mitigation expert to assist in presenting mitigating evidence at the punishment phase of his capital murder trial, petitioner failed to present the state habeas court with any evidence showing that any additional mitigating evidence was available in July, 1993, through psychiatric or other expert testimony, to assist at the punishment phase of petitioner's trial.<sup>92</sup> The same holds true for petitioner's more

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<sup>90</sup> As explained above, Dr. Sparks testified that petitioner's raw IQ test scores contained in petitioner's SAISD records, when properly indexed for the petitioner's chronological age, showed the petitioner had scored in the mid-eighties in 1973 and in the mid-seventies in 1978. See S.F. Trial, Volume XXXX, testimony of Dr. John C. Sparks, at pp. 6824-26. Furthermore, Dr. Sparks also identified two IQ test results contained in petitioner's TDCJ records which reflected the petitioner had been measured with an IQ of 86 in a May, 1985 interview and 93 in an April, 1987 interview. Id. at pp. 6833-34.

<sup>91</sup> As explained above, Dr. Sparks explained that the raw scores contained in petitioner's SAISD records had to be indexed based upon the petitioner's chronological age before those raw scores could be given any real meaning in terms of ranking the petitioner's intelligence vis-a-vis the population as a whole. See S.F. Trial, Volume XXXX, testimony of Dr. John C. Sparks, at pp. 6824-26.

<sup>92</sup> Petitioner apparently did not have the petitioner's IQ measured during petitioner's state habeas corpus proceeding or, if such a test was given, petitioner chose not to introduce the results of same before the state habeas court. Likewise, petitioner offered no expert testimony, psychiatric or otherwise, during the state habeas corpus proceeding. There was simply no evidence presented to the state habeas court upon which that court could have based a finding that petitioner was prejudiced by the failure of his trial counsel to obtain an independent IQ or mental health evaluation of the petitioner at the time of petitioner's capital murder trial. Moreover, given petitioner's inability, even several years later to mount any challenge to the validity of Dr.

generic complaint his trial counsel failed to “adequately” investigate petitioner’s background and intelligence. In short, petitioner’s state habeas counsel was guilty of the same defective performance for which petitioner now criticizes his trial counsel. Given the record before the Texas Court of Criminal Appeals in the course of petitioner’s state habeas corpus proceeding, that court’s conclusion petitioner’s trial counsel did not render deficient performance was consistent with clearly established constitutional principles. More significantly, the state habeas court correctly concluded petitioner failed to satisfy the prejudice prong of Strickland with regard to these aspects of petitioner’s multi-faceted ineffective assistance claim.

Furthermore, the state habeas court correctly concluded petitioner’s trial counsel had legitimate, objectively reasonable, strategic reasons for not pursuing potentially double-edged sword evidence regarding petitioner’s alleged history of cocaine abuse and the possibility the petitioner’s crime was committed while the petitioner was suffering the effects of cocaine-induced psychosis. Chief among these objectively reasonable reasons was the fact the petitioner vehemently denied he had committed the offense. Additionally, petitioner’s trial counsel reasonably concluded that introducing evidence which highlighted and emphasized the petitioner, then on parole following thirteen felony convictions in a ten-year span, was abusing cocaine at the time of the offense might have had a detrimental impact on the jury’s consideration of the special sentencing issues at the punishment phase of trial. The state habeas court’s conclusion

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Sparks’ interpretation of petitioner’s IQ test scores, the state habeas court had no evidence before it upon which to base a finding that petitioner’s trial counsel had engaged in professionally deficient conduct in failing to obtain such evaluations at or before petitioner’s trial.

petitioner's trial counsel acted in an objectively reasonable manner in so choosing to proceed at petitioner's trial was consistent with clearly established federal constitutional principles.<sup>93</sup>

Furthermore, having independently reviewed the entire record in this cause, this Court likewise concurs in the Texas Court of Criminal Appeals' determination petitioner was not "prejudiced" within the meaning of Strickland by his trial counsel's alleged failures to investigate

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<sup>93</sup> See Strickland v. Washington, 466 U.S. at 690-91 (recognizing that strategic choices regarding what investigations to pursue may properly be based, in part, on information imparted to counsel by the defendant and that strategic decisions made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable); Foster v. Johnson, 293 F.3d 766, 778-79 (5th Cir. 2002), cert. denied sub nom. Foster v. Epps, 123 S. Ct. 625 (2002) ("a tactical decision not to pursue and present potential mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable"); Lamb v. Johnson, 179 F.3d 352, 358 (5th Cir.), cert. denied, 528 U.S. 1013 (1999) (holding the same); Crane v. Johnson, 178 F.3d 309, 315 (5th Cir.), cert. denied, 528 U.S. 947 (1999) (holding that trial counsel who decided that potentially mitigating evidence was more harmful than helpful could reasonably choose not to introduce same); Boyd v. Johnson, 167 F.3d 907, 910-11 (5th Cir. 1999), cert. denied, 527 U.S. 1055 (2000) (holding that trial counsel was not deficient for failing to investigate and introduce evidence regarding the petitioner's IQ where evidence already in the record was conflicting in nature and counsel's first-hand observations of the petitioner gave no indication the petitioner was retarded or mentally ill); Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997), cert. denied, 522 U.S. 1120 (1998) (holding that tactical decisions not to pursue and present potentially mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable); Green v. Johnson, 116 F.3d at 1122 ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."); Boyle v. Johnson, 93 F.3d at 187-88 (holding that an attorney's decision not to pursue a mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies); West v. Johnson, 92 F.3d at 1406-09 (holding that a trial counsel's failure to conduct further investigation into the defendant's head injury and psychological problems was reasonable where interviews with the defendant and the defendant's family failed to produce any helpful information); Mann v. Scott, 41 F.3d 968, 984 (5th Cir. 1994), cert. denied, 514 U.S. 1117 (1995) (holding that a tactical decision not to introduce double-edged sword mitigating evidence is entitled to great deference); Andrews v. Collins, 21 F.3d at 623 (holding that counsel acted reasonably in failing to further pursue the defendant's mental capacity or background where counsel had no reason to believe that further investigation would be useful).

the petitioner's background or intelligence and to seek the assistance of mental health or mitigation experts prior to or during petitioner's trial.<sup>94</sup> The petitioner presented neither his trial court nor the state habeas court with any evidence showing he had ever been abused or deprived of physical or emotional needs while growing up or that he had ever accepted personal responsibility for causing the death of Sandra Deptawa in such a particularly brutal manner. Likewise, petitioner offered no explanation for his having stripped his victim from the waist down and placed her dead body in a bathtub filled with water. The circumstances of the offense, together with the petitioner's long criminal record, petitioner's record of violent acts while incarcerated, and the fact the petitioner had violated his parole prior to the commission of his offense, fully demonstrated his propensity for future violence. There is no reasonable probability that, but for the failure of petitioner's trial counsel to further investigate petitioner's background, consult with psychiatric

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<sup>94</sup> See Harris v. Cockrell, 313 F.3d 238, 244 (5th Cir. 2002) (holding that the failure to present double-edged evidence regarding the petitioner's allegedly abusive childhood was not prejudicial when viewed in the context of the petitioner's overall stable family background, and the petitioner's history of violent conduct while incarcerated); Ladd v. Cockrell, 311 F.3d 349, 359-60 (5th Cir. 2002) (holding that a petitioner was not prejudiced by his trial counsel's failure to present double-edged sword evidence of the petitioner's low childhood IQ, drug treatment as a child for psycho motor problems, and good behavior in an institutional setting where this same evidence was undermined by the petitioner's significantly higher IQ scores as an adult and the overwhelming evidence of the petitioner's future dangerousness); Boyd v. Johnson, 167 F.3d 907, 911 (5th Cir.), cert. denied, 527 U.S. 1055 (1999) (holding that a petitioner was not prejudiced by his trial counsel's failure to introduce evidence showing the petitioner was borderline mentally retarded where the petitioner's offense was cold-blooded and calculated and the petitioner had a track record of violent conduct).

Petitioner's relatively low IQ scores while a child, none of which would have rendered him mentally retarded in the opinion of Dr. Sparks, must be viewed in the context of the petitioner's significantly higher IQ scores measured when petitioner was an adult. Likewise, the brutal, cold-blooded, nature of the petitioner's offense renders all but the most egregious of errors by his trial counsel insufficient to support a finding of prejudice under Strickland.

or other mitigating evidence experts, or to have petitioner's IQ tested, the outcome of the punishment phase of petitioner's trial would have been any different.

Petitioner offered no evidence at the state habeas hearing to suggest his trial counsel's decisions not to request a mental health examination of the petitioner and not to develop evidence regarding petitioner's cocaine abuse were the products of anything other than fundamentally sound trial strategy. More significantly, petitioner offered the state habeas court no evidence showing what potentially mitigating evidence might have been developed had his trial counsel chosen to pursue a mental health examination of the petitioner or an investigation into petitioner's cocaine abuse. Thus, petitioner's complaints about these matters fail to satisfy either prong of Strickland.

3. Procedural Default and No Merit on Complaint Re Failure to Make a Naked Emotional Appeal for Mercy

Petitioner also faults his trial counsel for failing to "stage" an emotional appeal for petitioner's life by one or more of petitioner's family members. Petitioner offered the state habeas court no evidence showing that any of petitioner's family members would have been willing to engage in such a personally humiliating act. However, petitioner failed to present this aspect of his ineffective assistance claims to the state courts, in either his direct appeal or his state habeas corpus proceeding. This Court is authorized to note *sua sponte* a petitioner's procedural default.<sup>95</sup> Because petitioner failed to exhaust available state remedies with regard to his complaint his trial counsel should have asked petitioner's father to make a naked emotional appeal to the jury for

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<sup>95</sup> See Johnson v. Cain, 215 F.3d 489, 495 (5th Cir. 2000); Magouirk v. Phillips, 144 F.3d 348, 358 (5th Cir. 1998).

mercy, petitioner procedurally defaulted on same.<sup>96</sup> Thus, petitioner has procedurally defaulted on this aspect of his ineffective assistance claim herein.

Moreover, the emotional appeals implicit in the testimony of the petitioner's father and common law wife at the punishment phase of petitioner's trial were blunted by their admissions that (1) petitioner had repeatedly committed criminal acts while his common law wife was pregnant with their daughters, including numerous burglaries while the petitioner was on parole from an earlier conviction,<sup>97</sup> (2) the petitioner's criminal convictions had stung his family, as had the revocation of the petitioner's probation,<sup>98</sup> and (3) his family was unaware of his cocaine habit.<sup>99</sup> Under such circumstances, there is simply no reasonable probability that, but for the failure of petitioner's trial counsel to have petitioner's father or some other member of the

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<sup>96</sup> Procedural default exists where (1) a state court clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, or (2) the petitioner fails to exhaust all available state remedies, and the state court to which he would be required to petition would now find the claims procedurally barred. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). In either instance, the petitioner is deemed to have forfeited his federal habeas claim. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999).

<sup>97</sup> See S.F. Trial, Volume XXXI, testimony of Rene Cockrell, at pp. 6908 and 6915.

<sup>98</sup> Id., testimony of David Cockrell, at pp. 6893-94.

<sup>99</sup> Id., testimony of Rene Cockrell, at pp. 6910. Petitioner's father David testified at the evidentiary hearing held in petitioner's state habeas corpus proceeding that he was also unaware of the petitioner's cocaine habit. See S.F. State Habeas Hearing, Volume Two, testimony of David Cockrell, at pp. 97-98. Petitioner's sister Manida Davis gave similar testimony at that same hearing. Id., testimony of Manida Davis, at p. 86. Thus, had petitioner's trial counsel attempted to present an overtly emotional plea for mercy from members of petitioner's family, the prosecution would, no doubt, have argued that petitioner's family did not know very much about the petitioner's six hundred dollar a day (over \$200,000.00 a year) cocaine habit and, thus, did not have a legitimate basis for requesting mercy.

Furthermore, an emotional plea for mercy by petitioner's trial counsel would have invited an even more emotional plea for law enforcement by the prosecution.

petitioner's family plead for the petitioner's life, the outcome of the punishment phase of petitioner's capital murder trial would have been any different.

4. Conclusions

None of the petitioner's complaints regarding his trial counsel's alleged failure to adequately investigate the petitioner's background, secure expert assistance, or introduce mitigating evidence satisfy either prong of Strickland. Likewise, petitioner procedurally defaulted on his complaint that his trial counsel failed to orchestrate a naked, emotional appeal for mercy at the punishment phase of petitioner's capital murder trial and that complaint fails to satisfy the prejudice prong of Strickland.

For the reasons set forth above, the Texas Court of Criminal Appeals' rejection of these aspects of petitioner's multi-faceted ineffective assistance claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding.

D. Conflict of Interest Claim

1. The Claim

Petitioner argues next that his trial counsel suffered from "an institutionalized conflict of interest" in that said counsel operated under a fee arrangement with Bexar County in which petitioner's trial counsel (1) were unable to fully develop mitigating evidence on petitioner's behalf

and (2) were discouraged from seeking a plea bargain on petitioner's behalf by virtue of the prospect of receiving a smaller fee had they negotiated such a plea bargain for petitioner.<sup>100</sup>

2. No Procedural Default

Respondent argues petitioner failed to exhaust available state remedies on this aspect of petitioner's claims for federal habeas corpus relief.<sup>101</sup> As correctly pointed out by petitioner in his responsive pleading,<sup>102</sup> petitioner exhausted his complaint regarding this alleged conflict of interest by including same in petitioner's state habeas corpus application<sup>103</sup> and by attempting to present evidence in support of same through cross-examination of petitioner's trial counsel at the evidentiary hearing held in petitioner's state habeas corpus proceeding.<sup>104</sup> Thus, petitioner "fairly presented" this aspect of his ineffective assistance claims to the state habeas court.

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<sup>100</sup> See Petition, at pp. 40-43. Petitioner does not explain in any rational manner precisely how the hourly rate fee schedule for his trial counsel employed by Bexar County differs from any other hourly rate fee schedule employed throughout the legal profession as a whole. Petitioner does not allege any specific facts showing his trial counsel ever made a conscious decision to forego pursuit of any potential exculpatory evidence or mitigating evidence based on financial considerations. Likewise, petitioner does not allege any specific facts showing that petitioner's trial counsel ever made a conscious decision not to pursue plea bargain negotiations based on financial considerations.

More significantly, petitioner does not allege any specific facts showing precisely what the fee arrangement between petitioner's trial counsel and Bexar County was in connection with petitioner's capital murder trial.

<sup>101</sup> See Respondent's Answer and Motion for Summary Judgment, filed May 26, 2000, docket entry no. 13, at pp. 18-25.

<sup>102</sup> See Petitioner's Response to Respondent's Original Answer and Motion for Summary Judgment, filed June 9, 2000, docket entry no. 14, at pp. 1-7.

<sup>103</sup> See State Habeas Records, at p. 15.

<sup>104</sup> As explained below, however, petitioner failed to present the state habeas court with any evidence suggesting petitioner's trial counsel ever did or failed to do any identified act in the course of their representation of the petitioner at trial based upon financial considerations.

### 3. De Novo Review

However, the fact the petitioner exhausted state remedies on this aspect of his ineffective assistance claim herein is of little importance because petitioner failed to present any evidence to the state habeas court showing either that (1) his trial counsel operated under an actual conflict of interest arising from the fee arrangement under which said counsel was appointed or (2) petitioner was prejudiced within the meaning of Strickland by such arrangement.

As explained above, ordinarily, a convicted criminal defendant asserting a claim of ineffective assistance by his trial counsel must establish both that (1) the performance of his trial counsel fell below an objective level of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different.<sup>105</sup> An exception to this general rule applies and “prejudice” is presumed where an actual conflict of interest adversely affected counsel’s performance.<sup>106</sup> Petitioner does not allege that either of his

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<sup>105</sup> Bell v. Cone, 122 S.Ct. at 1850; Strickland v. Washington, 466 U.S. at 688-94.

<sup>106</sup> See Strickland v. Washington, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

The Fifth Circuit has limited the application of the Cuyler exception to the dual prongs of Strickland to instances of multiple representation, either concurrently or sequentially. See Perillo v. Johnson, 205 F.3d 775, 781 (5th Cir. 2000) (“An ‘actual conflict’ exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client.”); Moreland v. Scott, 175 F.3d 347, 349 (5th Cir.), cert. denied, 528 U.S. 937 (1999) (recognizing that the Cuyler standard applies only in the context of multiple representations); Hernandez v. Johnson, 108 F.3d 554, 569 (5th Cir.), cert. denied, 522 U.S. 984 (1997) (holding the same); Beets v. Scott, 65 F.3d 1258, 1266-72 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996), (holding that Strickland furnishes the proper analytical framework for claims in which a criminal defendant asserts that his counsel’s own personal interests (as opposed to those of another client) conflicted with those of the defendant).

trial counsel has ever represented any other client whose interests were in conflict with the petitioner's; thus, petitioner has not shown that either of his counsel suffered from an "actual conflict of interest."<sup>107</sup> Likewise, petitioner has alleged no specific facts showing that any alleged self-interest on the part of his trial counsel caused an "adverse effect" on the quality of petitioner's trial representation; that is, petitioner has failed to allege any facts showing his trial counsel failed to pursue "some plausible alternative defensive strategy or tactic" because of the allegedly conflicting interest.<sup>108</sup>

Under such circumstances, the Texas Court of Criminal Appeals erred when it applied the less stringent Cuyler conflict of interest standard,<sup>109</sup> rather than the dual prongs of Strickland, to

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<sup>107</sup> See Perillo v. Johnson, 205 F.3d at 781; Perillo v. Johnson, 79 F.3d 441, 447 (5th Cir. 1996) ("An 'actual conflict' exists when an attorney represents two clients whose interests in the outcome of a matter are different."); Beets v. Scott, 65 F.3d at 1266-72.

<sup>108</sup> See Perillo v. Johnson, 205 F.3d at 781-82 ("'Adverse effect' may be established with evidence that 'some plausible alternative defense strategy or tactic' could have been pursued, but was not because of the actual conflict impairing counsel's performance."); Beathard v. Johnson, 177 F.3d 340, 346 (5th Cir.), cert. denied, 528 U.S. 954 (1999) ("To show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest."); Hernandez v. Johnson, 108 F.3d at 560; Perillo v. Johnson, 79 F.3d 441, 449 (5th Cir. 1996).

<sup>109</sup> In its Order issued May 24, 1999 in petitioner's state habeas corpus proceeding, the trial court erroneously attempted to apply the Cuyler standard to petitioner's purported conflict of interest claim. See State Habeas Records, at p. 43.

However, in both his pleadings before the state habeas court and his evidence in support thereof introduced at the evidentiary hearing held in December, 1997, the petitioner failed to allege any specific facts, much less furnish any evidence, showing that his trial counsel were prevented by their own interest or by their interest in another's welfare (such as another client) from vigorously promoting the petitioner's welfare. Petitioner's complaints during his testimony in his state habeas corpus proceeding that he did not like the legal advice he received from his trial counsel do not satisfy the standard for establishing an "actual conflict of interest." See Vega v. Johnson, 149 F.3d 354, 360 (5th Cir. 1998), cert. denied, 525 U.S. 1119 (1999) (recognizing that a "conflict" between a defendant and his attorney regarding trial strategy has no constitutional

evaluate petitioner's "institutionalized conflict of interest" ineffective assistance claim.<sup>110</sup> However, this error affords no benefit to the petitioner because the state court correctly held the petitioner presented no evidence in his state habeas corpus proceeding showing the existence of a "conflict of interest" sufficient to establish a presumption of prejudice under Cuyler. In short, while the Texas Court of Criminal Appeals erroneously applied the Cuyler test to petitioner's purported "conflict of interest" claim, that court correctly ruled petitioner could not satisfy even that, less stringent, standard as opposed to the more exacting prejudice prong of Strickland.

Furthermore, having independently reviewed the records from the petitioner's trial and state habeas corpus proceeding, this Court concludes petitioner has failed to allege any specific facts in this Court in connection with his purported "conflict of interest" claim sufficient to satisfy the prejudice prong of Strickland.<sup>111</sup> Petitioner furnished the state habeas court with no specific factual allegations, much less any evidence, showing that either of his trial counsel ever made any decision in the course of their representation of the petitioner based in any manner upon either financial considerations or the fee arrangement in capital murder cases in Bexar County.

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significance as long as the defendant's wishes were respected on ultimate issues such as pleading guilty and testifying).

<sup>110</sup> See Beets v. Scott, 65 F.3d at 1272 (holding that Strickland furnished the proper analytical framework for review of a conflict of interest claim arising from defense counsel's negotiation of a media rights contract with regard to the defendant's story).

<sup>111</sup> See Lockhart v. Johnson, 104 F.3d 54, 58 (5th Cir.), cert. denied, 521 U.S. 1123 (1997) (holding that a capital murder defendant's complaint that his court-appointed trial counsel was the member of a law firm that was representing the state trial judge in an unrelated civil matter did not satisfy the prejudice prong of Strickland where the defendant failed to identify any decision by his defense counsel which was affected by said counsel's firm's representation of the trial judge).

This Court also independently concludes the petitioner failed to present the state habeas court with any evidence supporting a finding that petitioner's trial counsel engaged in any deficient performance, i.e., performance that fell below an objective level of reasonableness, in the course of petitioner's trial court proceedings. On the contrary, petitioner's trial counsel (1) presented a vigorous defense at the guilt-innocence phase of trial, (2) presented evidence at the punishment phase of trial showing the petitioner was a loving son, husband, and father, and (3) argued the petitioner's criminal history included primarily property crimes.

Given (1) the petitioner's refusal, even years later, to accept responsibility for his crime, (2) the petitioner's demonstrated propensity to commit acts of violence while incarcerated, and (3) Dr. Sparks' devastating critique of petitioner's trial expert's suggestion the petitioner was mentally retarded (an evaluation which the petitioner failed to challenge during his state habeas corpus proceeding), petitioner's trial counsel had very little to work with at the punishment phase of petitioner's capital murder trial. Petitioner's testimony at his state habeas hearing amounted to little more than a litany of generalized complaints about little more than the fact the petitioner was unhappy, he had been convicted of capital murder, and had received a sentence of death. Petitioner's trial counsel cannot be faulted for having failed to present mental health evidence, including evidence relating to cocaine psychosis, when petitioner himself failed to present any such evidence during petitioner's state habeas corpus proceeding.

The Texas Court of Criminal Appeals correctly concluded the factual bases underlying petitioner's remaining complaints in connection with his purported "conflict of interest" claim were refuted by the record before that court. For instance, petitioner's assertion his trial counsel's performance was hindered by virtue of a fee arrangement that implicitly discouraged said

counsel from seeking a plea bargain on petitioner's behalf or from developing potentially mitigating evidence regarding the petitioner's history of drug abuse finds no support in the record. Petitioner testified during the evidentiary hearing held in his state habeas corpus proceeding that he would not have accepted a plea bargain had one been offered by the prosecution because he did not murder anyone.<sup>112</sup> Petitioner offered no testimony or other evidence at that hearing from any source indicating the prosecution ever considered offering petitioner a plea bargain or would have even engaged in negotiations toward that end had petitioner's trial counsel requested same.<sup>113</sup> Petitioner's lead trial counsel, attorney John Hrncir, testified at the petitioner's state habeas hearing that (1) defense counsel had the benefit of a court-appointed investigator and a professional expert, i.e., Dr. Alexander,<sup>114</sup> (2) petitioner's defense team did not believe they needed the assistance of any additional experts regarding the issue of future dangerousness,<sup>115</sup> (3) petitioner's defense team was never denied any resources necessary for them to present any defense they wished to pursue at the guilt-innocence phase of trial,<sup>116</sup> (4) petitioner's trial counsel made a strategic decision not to pursue investigation of petitioner's cocaine abuse as mitigating evidence

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<sup>112</sup> See S.F. State Habeas Hearing, Volume Two, testimony of Timothy Cockrell, at pp. 66-67.

<sup>113</sup> Petitioner's state habeas counsel made no effort to explore this subject when the lead prosecutor from petitioner's trial, attorney Mike Cohen, testified at the evidentiary hearing held in petitioner's state habeas corpus proceeding. See S.F. State Habeas Hearing, Volume Three, testimony of Mike Cohen, at pp. 65-71.

<sup>114</sup> See S.F. State Habeas Hearing, Volume two, testimony of John Hrncir, at pp. 137-40, 149-50, and 176.

<sup>115</sup> Id.

<sup>116</sup> Id. at pp. 137-38.

because the petitioner denied he abused cocaine and because such evidence would have had far greater aggravating impact than mitigating impact upon the jury at the punishment phase of petitioner's trial,<sup>117</sup> and (5) each of petitioner's defense counsel were paid eight thousand five hundred dollars (\$8,500.00) for their defense of petitioner at trial.<sup>118</sup> Petitioner's co-counsel, attorney Gordon Armstrong, testified that (1) petitioner's defense team received full discovery from the prosecution and had a court-appointed investigator to assist them,<sup>119</sup> (2) they secured Dr. Alexander because of his expertise in construing petitioner's educational records,<sup>120</sup> (3) petitioner's defense team had no problem getting funds to retain Dr. Alexander,<sup>121</sup> (4) nothing in the fee arrangement with Bexar County impacted upon their defense of the petitioner,<sup>122</sup> (5) the petitioner never indicated he wanted a plea bargain,<sup>123</sup> (6) after consulting with Dr. Alexander, they decided not to have the petitioner evaluated by a psychiatrist,<sup>124</sup> (7) they did not consult with experts on the issue of future dangerousness,<sup>125</sup> (8) they were aware the petitioner had a drug problem,<sup>126</sup> (9)

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<sup>117</sup> Id. at pp. 138-40, 149-50, 172, 175, and 180.

<sup>118</sup> Id. at p. 148.

<sup>119</sup> See S.F. State Habeas Hearing. Volume Three, testimony of Gordon Armstrong, at pp. 7-8.

<sup>120</sup> Id. at pp. 16-17.

<sup>121</sup> Id. at p. 18.

<sup>122</sup> Id. at p. 29.

<sup>123</sup> Id.

<sup>124</sup> Id. at p. 37.

<sup>125</sup> Id. at p. 38.

<sup>126</sup> Id. at pp. 46-47.

they did not call members of the petitioner's family to testify at the guilt-innocence phase of trial regarding the petitioner's illiteracy because they had Dr. Alexander's testimony and test results,<sup>127</sup> (10) while petitioner's trial counsel were not paid for their services until after petitioner's trial was completed, he was unaware of the other details of the fee arrangement under which they were appointed,<sup>128</sup> and (11) they did not consider requesting expert assistance with regard to petitioner's history of drug abuse because testimony regarding the petitioner's drug abuse would have had both mitigating and aggravating qualities.<sup>129</sup>

Petitioner offered no evidence at the state habeas hearing to suggest his trial counsel's reasons for not requesting a mental health examination of the petitioner or attempting to develop potentially mitigating evidence regarding petitioner's cocaine abuse were the product of anything other than fundamentally sound trial strategy. More significantly, petitioner offered the state habeas court no evidence showing what potentially mitigating evidence might have been developed had his trial counsel chosen to pursue a mental health examination of the petitioner or an investigation into petitioner's cocaine abuse. Thus, petitioner's complaints about these matters fail to satisfy either prong of Strickland.

Insofar as petitioner contends his trial counsel somehow prevented him from testifying at trial, that contention evaporated completely during the evidentiary hearing held in petitioner's state habeas corpus proceeding when (1) petitioner admitted under oath that (a) his attorneys told him

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<sup>127</sup> Id. at p. 50.

<sup>128</sup> Id. at pp. 58-59.

<sup>129</sup> Id. at p. 64.

it was his choice whether to testify,<sup>130</sup> (b) neither of his trial counsel ever disobeyed a directive the petitioner gave them,<sup>131</sup> (c) while petitioner initially wished to take the stand, his attorneys advised petitioner they did not want him to testify at trial because the prosecution would use petitioner's many prior convictions to impeach him,<sup>132</sup> and (4) had he testified at either stage of his trial, the petitioner would have insisted he had no role in, or knowledge of, the crime<sup>133</sup>; (2) attorney Hrncir testified that (a) he discussed petitioner's right to testify with the petitioner on many occasions,<sup>134</sup> (b) the petitioner appeared to understand he had the right to testify and, in fact, actually testified during a pretrial hearing,<sup>135</sup> (c) the petitioner understood the upsides and downsides to his testifying at trial,<sup>136</sup> (d) he believed petitioner's thirteen prior felony convictions would be devastating as impeachment had petitioner testified at the guilt-innocence phase of trial,<sup>137</sup> (e) the petitioner was also well aware of his right to testify at the punishment phase of trial,<sup>138</sup> (f) he advised petitioner against testifying at the latter stage of trial because the petitioner would have

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<sup>130</sup> See S.F. State Habeas Hearing, Volume Two, testimony of Timothy Cockrell, at pp. 57-58.

<sup>131</sup> Id. at p. 60.

<sup>132</sup> Id. at pp. 24 and 56-61.

<sup>133</sup> Id. at pp. 46-47.

<sup>134</sup> See S.F. State Habeas hearing, Volume Two, testimony of John Hrncir, at pp. 124-25 and 171.

<sup>135</sup> Id. at p. 125.

<sup>136</sup> Id. at pp. 125-30.

<sup>137</sup> Id. at pp. 126-27.

<sup>138</sup> Id. at pp. 127-28 and 171.

denied responsibility for the offense and he could see no upside to alienating the jury at that juncture,<sup>139</sup> and (g) petitioner made the ultimate decision not to testify at each phase of trial<sup>140</sup>; and (3) attorney Armstrong testified that (a) defense counsel discussed petitioner's right to testify with the petitioner at both phases of trial,<sup>141</sup> (b) petitioner's defense counsel advised petitioner against testifying at the guilt-innocence phase of trial because petitioner's many prior convictions would be revealed to the jury,<sup>142</sup> (c) they advised the petitioner the downside to his testifying at the punishment phase of trial was that petitioner's refusal to admit his guilt could be used by the prosecution to argue in favor of an affirmative answer to the continuing threat special issue,<sup>143</sup> and (d) petitioner voluntarily chose not to testify, without any coercion from counsel.<sup>144</sup>

As explained above, neither the fact the petitioner felt his trial counsel did not believe his protestations of innocence<sup>145</sup> nor the fact the petitioner disliked the legal advice he received from

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<sup>139</sup> Id. at pp. 127-29.

<sup>140</sup> Id. at p. 128.

<sup>141</sup> See S.F. State Habeas Hearing, Volume Three, testimony of Gordon Armstrong, at pp. 22-23 and 25-27.

<sup>142</sup> Id. at p. 26.

<sup>143</sup> Id. at p. 28.

<sup>144</sup> Id. at pp. 22-28.

<sup>145</sup> See S.F. State Habeas Hearing, Volume Two, testimony of Timothy Cockrell, at p. 23.

his trial counsel regarding the many reasons why the petitioner should not testify at trial<sup>146</sup> gave rise to a “conflict of interest” between petitioner and said counsel.<sup>147</sup>

4. Conclusions

Petitioner did not fail to exhaust available state remedies with regard to his purported “conflict of interest” claim. However, he did fail to present the state habeas court with any evidence supporting a finding that (1) his trial counsel suffered from an “actual conflict” of interest, as that term was employed by the Supreme Court in Strickland and Cuyler or (2) any decision made by his trial counsel was “adversely effected” by any financial considerations. Petitioner’s complaints in connection with his purported “conflict of interest” claim fail to satisfy either prong of Strickland.

E. Incompetence to Stand Trial Claims

1. The Claims

Petitioner argues that (1) the state trial court erred when it failed to immediately order a competency hearing after Dr. Alexander expressed his opinion regarding the petitioner’s purportedly low IQ and (2) his trial counsel should have requested a competency hearing for the petitioner once they became aware Dr. Alexander believed the petitioner had once been measured with an IQ in the thirties.<sup>148</sup>

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<sup>146</sup> Id. at pp. 24, 56-58, and 61.

<sup>147</sup> See Vega v. Johnson, 149 F.3d at 360.

<sup>148</sup> See Petition, at pp. 43-47.

## 2. AEDPA Review

### a. The Pate Claim

It is well-settled that a criminal defendant may not be tried unless he is competent.<sup>149</sup> A criminal defendant is competent to stand trial if (1) he has sufficient ability at the time of trial to consult with his attorney with a reasonable degree of rational understanding and (2) he has a rational as well as factual understanding of the proceedings against him.<sup>150</sup>

The issue of competence may arise in two different contexts. First, a trial court is required to conduct an inquiry into the defendant's mental capacity *sua sponte* if the evidence raises a bona fide doubt as to competence; if the trial court received evidence, viewed objectively, which raises a reasonable doubt as to competence, yet fails to make further inquiry, the defendant is denied a fair trial; in such instances, a federal habeas court must consider whether a meaningful hearing can be held *nunc pro tunc* to determine retrospectively the defendant's competence at the time of trial; and, if so, the petitioner bears the burden of proving his incompetence by a preponderance of the evidence.<sup>151</sup> Second, a habeas petitioner may simply assert he was incompetent at the time of trial, thereby asserting a violation of the substantive right not to be tried while incompetent,

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<sup>149</sup> Cooper v. Oklahoma, 517 U.S. 348, 355 (1996); Godinez v. Moran, 509 U.S. 389, 396 (1993); Drope v. Missouri, 420 U.S. 162, 171 (1975) ("a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); Pate v. Robinson, 383 U.S. 375, 378 (1966).

<sup>150</sup> See Godinez v. Moran, 509 U.S. at 396; Drope v. Missouri, 420 U.S. at 172; Dusky v. United States, 362 U.S. 402, 402 (1960).

<sup>151</sup> See Pate v. Robinson, 383 U.S. 375, 386-87 (1966). This type of competence inquiry is frequently referred to as a Pate inquiry, after the Supreme Court's opinion in Pate v. Robinson, which established that procedure.

rather than the procedural guarantee of a competency hearing outlined above.<sup>152</sup> Having carefully reviewed petitioner's pleadings herein, as well as petitioner's state court pleadings, this Court concludes petitioner's pleadings herein do not assert a claim that the petitioner was actually incompetent to stand trial but, rather, are limited to a complaint that the state trial court should have held a competency hearing.<sup>153</sup>

In its Order issued following the evidentiary hearing held in petitioner's state habeas corpus proceeding, the state trial court found that (1) Dr. Alexander opined the petitioner's school records included a notation from one of the years the petitioner spent in the second grade suggesting the petitioner suffered from "minimal brain injury," (2) Dr. Alexander interpreted the petitioner's raw scores on the Wechsler Intelligence Scale for Children administered in January, 1973 and December, 1978 (when the petitioner was nine and fifteen, respectively) as indicating the petitioner was some sixty points below the average score, (3) Dr. Sparks testified, however, that raw scores on the Wechsler Intelligence Scale for Children must be indexed based upon the test

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<sup>152</sup> See Carter v. Johnson, 131 F.3d 452, 459 n.10 (5th Cir. 1997), cert. denied, 523 U.S. 1099 (1998).

<sup>153</sup> Insofar as petitioner's pleadings in this Court can be construed as asserting that petitioner was actually incompetent to stand trial, petitioner procedurally defaulted on that claim by failing to "fairly present" same to any state court. This Court has carefully reviewed petitioner's state trial court pleadings, petitioner's appellant's brief, and petitioner's state habeas corpus pleadings and finds nothing contained therein which "fairly presented" to the state courts a claim that petitioner was actually incompetent to stand trial. Rather, petitioner's claims before the state courts in the course of petitioner's state habeas corpus proceeding were all phrased and framed in terms of something analogous to a Pate v. Robinson claim, rather than a claim of actual incompetence to stand trial.

subject's chronological age to be properly interpreted,<sup>154</sup> (4) Dr. Sparks testified the petitioner was not mentally retarded and was competent to stand trial, (5) both of the petitioner's trial counsel testified at the state habeas corpus hearing that they were never aware of any evidence indicating the petitioner was incompetent to stand trial and they had no difficulty communicating with the petitioner, and (6) throughout the trial court proceedings, including during petitioner's coherent testimony at a pretrial hearing, voir dire, and the trial itself, the state trial judge observed nothing to indicate the petitioner was incompetent to stand trial.<sup>155</sup>

In that same Order, the same state trial judge who presided over petitioner's trial concluded that, while there was evidence suggesting the petitioner suffered from a learning disorder which hampered his ability to read, there was no evidence showing the petitioner was incompetent to stand trial, i.e, that the petitioner lacked either sufficient present ability to consult with his lawyer

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<sup>154</sup> As explained above, Dr. Sparks testified that (1) when petitioner's scores were properly interpreted, the petitioner's IQ was measured on the January, 1973 test in the mid-eighties and on the December, 1978 test in the mid-seventies, see S.F. trial, Volume XXXX, testimony of John C. Sparks, at pp. 6824-26; (2) while it is undisputed the petitioner cannot read very well, there is a difference between literacy and intelligence, Id. at pp. 6827-28; (3) petitioner's TDCJ records include indications the petitioner scored 86 and 93 on the Wechsler Adult Intelligence Scale on tests administered in May, 1985 and April, 1987, respectively, Id. at pp. 6833-36; (4) petitioner improved scores on his adult IQ tests may have reflected a recognition of petitioner's poor reading ability and improved motivation on the petitioner's part, Id. at pp. 6839-41; (5) the petitioner also scored a 75 on an IQ test administered in March, 1984, Id. at pp. 6842-43; and (6) the petitioner scored above the range considered mentally retarded on all five IQ tests reflected in the petitioner's SAISD and TDCJ records, Id. at p. 6843.

<sup>155</sup> See State Habeas Records, at pp. 127-33. The same findings are found in the separate copy of the state trial court's Order issued May 24, 1999 included among the records relating to petitioner's state habeas corpus proceeding (henceforth "Trial Court Order in State Habeas Proceeding"), at pp. 50-56.

with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings.<sup>156</sup>

The foregoing findings and conclusions were fully supported by the record before the state habeas court. Petitioner's testimony on this issue at the evidentiary hearing held in his state habeas corpus proceeding was highly equivocal and non-specific. For instance, petitioner testified he understood only some of what was going on at his trial and his defense counsel did not believe his protestations of innocence.<sup>157</sup> However, under cross-examination, the petitioner admitted that (1) he could not recall any specific instances of events at trial that he did not understand,<sup>158</sup> (2) he never told the trial judge he did not understand what was happening at trial,<sup>159</sup> (3) he understood Dr. Alexander most of the time,<sup>160</sup> (4) he understood when his attorneys explained to him that, if he testified at the guilt-innocence phase of trial, the prosecution could bring up all of his prior convictions,<sup>161</sup> and (5) his attorneys told him it was his choice whether he would testify, and he told them he did not wish to testify.<sup>162</sup> Furthermore, as pointed out by the state trial court in its Order recommending denial of petitioner's state habeas corpus application, both of the petitioner's

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<sup>156</sup> See State Habeas Records, at pp. 134-35; and Trial Court Order in State Habeas Proceedings, at pp. 57-58.

<sup>157</sup> See S.F. State Habeas Hearing, Volume Two, testimony of Timothy Cockrell, at pp. 23-24.

<sup>158</sup> Id. at p. 41.

<sup>159</sup> Id. at p. 55.

<sup>160</sup> Id. at p. 53.

<sup>161</sup> Id. at p. 56.

<sup>162</sup> Id. at pp. 57-58.

trial counsel testified at the state habeas corpus hearing that they were unaware of any facts suggesting the petitioner was incompetent to stand trial and they had no difficulty communicating with the petitioner, who appeared to them to understand the proceedings against him.<sup>163</sup>

Although not specifically referenced by the state trial court in its Order recommending denial of petitioner's state habeas corpus application, there was other compelling evidence in the record before that court establishing the petitioner was competent to stand trial. During petitioner's trial, Dr. Alexander testified that (1) he gave the petitioner a series of tests on April 27, 1993, designed to gauge the petitioner's reading and writing abilities,<sup>164</sup> (2) at that time, the petitioner understood why he was being tested and understood he was on trial for capital murder,<sup>165</sup> (3) throughout that testing, the petitioner was able to follow his directions,<sup>166</sup> (4) he did not test the petitioner's IQ,<sup>167</sup> and (5) while the petitioner scored very poorly on the reading and writing tests he administered, neither academic achievement nor academic skills are necessarily linked to a person's IQ.<sup>168</sup> Equally compelling is the fact that, at the evidentiary hearing held in

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<sup>163</sup> See S.F. State Habeas Hearing, Volume Two, testimony of John Hrcir, at pp. 125-25; and Volume Three, testimony of Gordon Armstrong, at pp. 9, 19-21, and 37. Attorney Hrcir also testified that while he was aware of Dr. Alexander's opinion that the petitioner had a very low IQ, he did not believe that fact, standing alone, mandated a competency hearing for the petitioner. See S.F. State Habeas Hearing, Volume Two, testimony of John Hrcir, at pp. 158-60.

<sup>164</sup> See S.F. Trial, Volume XXXVI, testimony of Ronnie Alexander, at pp. 6265-91.

<sup>165</sup> See S.F. Trial, Volume XXXVII, testimony of Ronnie Alexander, at pp. 6329 and 6332-33.

<sup>166</sup> Id. at p. 6345.

<sup>167</sup> Id. at pp. 6389 and 6397.

<sup>168</sup> Id. at pp. 6391 and 6394-95.

petitioner's state habeas corpus proceeding, petitioner offered no evidence controverting either Dr. Sparks' conclusions at trial regarding the proper interpretation of the petitioner's IQ based on the raw scores contained in petitioner's school records or Dr. Sparks' testimony interpreting petitioner's IQ scores on three separate sets of TDCJ admission records. Finally, petitioner's arguments in support of his Pate claim focus almost exclusively on the issue of the petitioner's IQ, rather than on the proper legal standard, i.e., whether, at the time of trial, the petitioner possessed (1) sufficient ability to consult with his attorney with a reasonable degree of rational understanding and (2) a rational as well as factual understanding of the proceedings against him. Petitioner offered the state habeas court no evidence addressing this standard but instead, attempted unsuccessfully to turn his Pate claim into a debate about the petitioner's childhood IQ scores and reading ability, a leap which even Dr. Alexander was unwilling to make.<sup>169</sup>

In its Order recommending denial of the petitioner's state habeas corpus application, the state trial court identified and applied the correct constitutional standard for evaluating petitioner's complaint about the absence of a competency hearing.<sup>170</sup> Therefore, given the record before the state habeas court, the Texas Court of Criminal Appeals' rejection on the merits of petitioner's Pate claim was neither contrary to nor involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding.

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<sup>169</sup> Id.

<sup>170</sup> See State Habeas Records, at pp. 134-35; and Trial Court Order in State Habeas Proceeding, at pp. 57-58.

b. Ineffective Assistance Claim

Petitioner presented the state habeas court with no evidence establishing that, as of the time of petitioner's trial, the petitioner lacked either sufficient ability at the time of trial to consult with his attorney with a reasonable degree of rational understanding or a rational, as well as factual, understanding of the proceedings against him.

Dr. Alexander's interpretations of petitioner's childhood IQ test scores were eviscerated with surgical precision by Dr. Sparks' testimony. Moreover, Dr. Alexander's opinions regarding petitioner's childhood IQ test results were also contradicted by three separate adult IQ test scores contained in petitioner's TDCJ records, all of which indicated the petitioner had tested well above the range of the mentally retarded and had achieved significantly greater scores each time he was evaluated by TDCJ personnel.

Petitioner's conclusory assertions that he did not understand "some" events that transpired during his trial was convincingly undermined by (1) his own inability to identify any such events, (2) petitioner's admissions he consulted extensively with his trial counsel regarding the decision whether he would testify at either phase of his capital murder trial, (3) the testimony of petitioner's trial counsel that they had no difficulty communicating with the petitioner and were unaware of any evidence suggesting the petitioner was incompetent to stand trial, (4) the state trial court's first-hand observations of the petitioner's demeanor and behavior, both during petitioner's coherent testimony at a pretrial hearing, as well as throughout voir dire and the trial itself, and (5) Dr. Alexander's testimony regarding the petitioner's ability to follow directions, ability to complete a battery of reading and writing tests, and understanding of why those tests were being administered to him.

Considering the evidence presented at the hearing held in petitioner's state habeas corpus proceeding, as well as Dr. Sparks' testimony regarding the "true" nature of the petitioner's IQ, the state trial court properly concluded petitioner's trial counsel had acted in an objectively reasonable manner in not requesting a competency hearing for petitioner.<sup>171</sup> Likewise, this Court independently concludes the failure of petitioner's trial counsel to request a competency hearing did not cause the performance of said counsel to fall below an objective level of reasonableness.

Moreover, having independently reviewed the records from the petitioner's trial court and state habeas corpus proceedings, particularly the petitioner's coherent, lucid, and responsive testimony given during a pretrial hearing held in conjunction with petitioner's motion to suppress his confession,<sup>172</sup> as well as the trial testimony of Doctors Alexander and Sparks and petitioner's testimony at his state habeas corpus hearing, this Court concludes there is no reasonable probability that, but for the failure of petitioner's trial counsel to request a competency hearing for the petitioner, the outcome of the petitioner's trial would have been any different.

Accordingly, the Texas Court of Criminal Appeals' rejection on the merits of this aspect of petitioner's ineffective assistance claim in the course of petitioner's state habeas corpus proceeding was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding.

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<sup>171</sup> Id.

<sup>172</sup> See S.F. Trial, Volume VII, testimony of Timothy Cockrell, at p. 419-58.

### 3. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits of the petitioner's Pate claim, as well as petitioner's inextricably intertwined ineffective assistance claim, were compelled by virtue of the overwhelming evidence before that court establishing the petitioner was fully competent to stand trial and the abject failure of petitioner to present the state habeas court with any evidence even suggesting otherwise. While petitioner spent considerable effort attempting to construct a house of cards founded upon Dr. Alexander's erroneous interpretation of petitioner's childhood IQ test scores, petitioner presented the state habeas court with no evidence showing the petitioner ever lacked either sufficient ability at the time of trial to consult with his attorney with a reasonable degree of rational understanding or a rational, as well as factual, understanding of the proceedings against him. Under such circumstances, the Texas Court of Criminal Appeals' rejections on the merits of petitioner's Pate claim and his related ineffective assistance claim were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding.

#### F. Failure to Object to Punishment Phase Jury Argument

##### 1. The Claim

In his final assertion of ineffective assistance,<sup>173</sup> petitioner contends his trial counsel rendered ineffective assistance by failing to object to the concluding portion of the prosecution's closing argument at the punishment phase of trial:

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<sup>173</sup> See Petition, at pp. 47-50.

In 87-CR-0114 when he committed the burglary of Mr. LaSalle McDonald's home again, he's left you no choice but to vote for the death penalty. On the twelfth case, when he committed the offense of burglary and broke into Beatrice Koenig's house and was convicted in 87-CR-0112, he left you no choice but yes, to vote for the death penalty. Twelve separate offenses.

Is there mitigation in this case? Is there nothing -- no evidence to show he's a future danger? Is there no evidence other than to show yes, he is a future danger to our society? Because he will commit acts of violence, criminal acts of violence, criminal acts in the future. And that there is no mitigation because here's number thirteen.

What more do you need, ladies and gentlemen, if there isn't enough right here? But you know, here's number fourteen. Here's number fourteen, Sandra Deptawa. If that does not show the need for the death penalty, to take this woman and to make her into this by his own hands, what more do you need, ladies and gentlemen?

Don't let the blood of the fifteenth victim be on your hands. He's left you no choice. Follow your oath. Do your duty. It is not easy, but you have no choice. And we told you that at the first, that this was a case of choices and consequences.

He knew what he was doing. He's known what he's done for 10 years. And he's brought you into this. Don't feel sorry for him. Feel bad about what you have to do. That is okay. But don't feel sorry for this killer and don't let the blood of that last victim be on your hands.<sup>174</sup>

## 2. AEDPA Review

Initially, this Court notes the authorities cited by petitioner in both his federal habeas corpus petition and his state habeas corpus application in support of this claim are inapposite to the facts and circumstances of petitioner's case. The petitioner's authorities address the well-settled legal principle announced by the United States Supreme Court in Caldwell v. Mississippi.<sup>175</sup> In Caldwell, the Supreme Court addressed an instance in which a capital murder prosecutor's jury argument suggested in an erroneous and misleading manner that the jury was not

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<sup>174</sup> See S.F. Trial, Volume XXXXI, at pp. 6967-68.

<sup>175</sup> 472 U.S. 320 (1985).

the final arbiter of the defendant's fate.<sup>176</sup> To establish a Caldwell violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."<sup>177</sup> In reviewing a Caldwell claim, the proper inquiry is whether under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of the imposition of the death penalty rests elsewhere.<sup>178</sup> There is nothing about the prosecution's closing argument at the punishment phase of petitioner's capital murder trial which could have been rationally construed as misleading the petitioner's sentencing jury regarding the ultimate responsibility for imposing the sentence of death upon the petitioner. Therefore, nothing said by the prosecution in its closing argument at the punishment phase of petitioner's trial violated the principle recognized in Caldwell.

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<sup>176</sup> In Caldwell, the Supreme Court held the following statement by the prosecution during its closing argument undermined reliable exercise of jury discretion:

Now, [the defense] would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can they be? Your job is reviewable. They know it.

Caldwell v. Mississippi, 472 U.S. at 325, 329,.

<sup>177</sup> Dugger v. Adams, 489 U.S. 401, 407 (1989); Montoya v. Scott, 65 F.3d 405, 420 (5th Cir. 1995), cert. denied, 517 U.S. 1133 (1996); Sawyer v. Butler, 881 F.2d 1272, 1285 (5th Cir. 1989), affirmed sub nom. Sawyer v. Smith, 497 U.S. 227 (1990).

<sup>178</sup> See Montoya v. Scott, 65 F.3d at 420 (holding that a Texas trial court's instructions during voir dire that were remarkably similar to the prosecution's statements accurately explaining the Texas special sentencing issues in a capital murder trial and the effect of the jury's answers to those issues did not violate the holding in Caldwell); Mann v. Scott, 41 F.3d at 984 (holding that a prosecutor's statements during closing argument to the effect the jury knew the defendant would not be executed the same night that the jury returned its verdict at the punishment phase of trial did not violate the holding in Caldwell); Sawyer v. Butler, 881 F.2d at 1286-87.

When reviewing complaints about allegedly objectionable jury argument, it is helpful to put those remarks in proper context.<sup>179</sup> In analyzing a complaint about prosecutorial jury argument, the Supreme Court has declared that the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.<sup>180</sup> Having independently reviewed the record from the petitioner's trial, this Court concludes the prosecution's jury argument in question did not "so infect" the petitioner's trial with unfairness as to deny petitioner due process of law.<sup>181</sup>

When viewed in proper context, the prosecutor's closing arguments, to which petitioner made no objection at trial but to which petitioner now takes exception, were little more than summations of the evidence then before the jury,<sup>182</sup> logical deductions drawn from that same evidence,<sup>183</sup> as well as a plea for law enforcement. Under both federal and Texas law, proper

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<sup>179</sup> See Greer v. Miller, 483 U.S. 756, 766 (1987); Darden v. Wainwright, 477 U.S. 168, 179 (1986).

<sup>180</sup> See Darden v. Wainwright, 477 U.S. at 181.

<sup>181</sup> Petitioner cites to no authority holding that a prosecutor's colorful or hyperbolic pleas for law enforcement, which drew no objection at trial from defense counsel, mandate reversal of a conviction supported by overwhelming evidence. Nor has this Court located any authority to support such a proposition.

<sup>182</sup> The evidence at the punishment phase of petitioner's trial was undisputed that the petitioner had been convicted of more than a dozen felony offenses in the ten years prior to the murder of Sandra Depta.

<sup>183</sup> The lurid manner in which the petitioner posed his half-naked victim in the bathtub after strangling her with sufficient force to crush both bones and cartilage in her neck, taken together with the petitioner's demonstrated track record of committing assaults upon other prisoners while incarcerated and the absence of any evidence showing the petitioner had accepted responsibility for his offense, combined to make the prosecution's assertion that the petitioner would kill again a reasonable deduction from the evidence then before the jury.

closing argument by the prosecution in criminal trials fall into four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) pleas for law enforcement.<sup>184</sup> In its Order recommending denial of petitioner's state habeas corpus application, the state trial court concluded the prosecution's jury argument in question was unobjectionable because it constituted a plea for law enforcement which requested the jury to impose a death sentence as a means of preventing further violent behavior on the part of the petitioner.<sup>185</sup> This Court concludes there was nothing unreasonable about the Texas Court of Criminal Appeals' conclusion that petitioner's trial counsel had no legitimate basis for an objection to the jury argument in question.

Because the Texas Court of Criminal Appeals reasonably concluded there was no legitimate basis for an objection to the prosecution's jury argument in question, that same court's conclusion that petitioner's trial counsel did not render deficient performance by failing to object thereto is unassailable. Counsel is not required to make futile objections.<sup>186</sup>

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<sup>184</sup> See Buxton v. Collins, 925 F.2d 816, 825 (5th Cir.), cert. denied, 498 U.S. 1128 (1991) (recognizing that the four proper areas for prosecutorial jury argument are summation of the evidence, reasonable inference from the evidence, answers to opposing counsel's argument, and pleas for law enforcement); Westbrook v. State, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000), cert. denied, 532 U.S. 944 (2001) (holding that Texas law recognizes as legitimate and appropriate the same four types of prosecutorial jury argument; Guidry v. State, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999), cert. denied, 531 U.S. 837 (2000) (holding the same); and Hathorne v. State, 848 S.W.2d 101, 117 (Tex. Crim. App. 1992), cert. denied, 509 U.S. 932 (1993), (holding the same).

<sup>185</sup> See State Habeas Records, at pp. 59-50; and Trial Court Order in State Habeas Proceeding at pp. 59-60.

<sup>186</sup> Koch v. Puckett, 907 F.2d at 527.

Moreover, having independently reviewed the record from petitioner's trial, this Court concludes there is no reasonable probability that, but for the failure of petitioner's trial counsel to object to the prosecution's closing jury argument, the outcome of the punishment phase of the petitioner's trial would have been any different.<sup>187</sup> The petitioner offered his sentencing jury virtually no evidence which cast blame for his offense on anyone other than himself or his own voluntary cocaine abuse. Petitioner had no history of physical or sexual abuse, had never been deprived as a child, came from a loving family, and, despite his reading disability, had been able to learn skills such as how to work on cars. The evidence of the petitioner's propensity for future violence, whether in prison or otherwise, combined with the petitioner's refusal to demonstrate a sincere acceptance of responsibility for his brutal crime virtually guaranteed the petitioner's jury

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<sup>187</sup> Even assuming the petitioner's trial counsel should have objected to the portion of the prosecution's closing argument in question and the state trial court would have sustained such an objection, petitioner has still identified no authority compelling the state trial court to declare a mistrial under such circumstances. Nor has petitioner identified any authority holding that a curative instruction, directing the jury to disregard the prosecution's argument, would have been inadequate to protect the petitioner's right to a fair trial. Likewise, this Court has located no authority to support the proposition that anything beyond a simple curative instruction would have been necessary to protect the petitioner's right to a fair trial. In sum, even if petitioner's trial counsel had objected to the prosecution's argument and the state trial court had sustained such an objection, the likely next step would have been an instruction by the state trial court directing the jury to disregard the objectionable jury argument. There is no reasonable probability the state trial court would have ordered a mistrial even if petitioner's trial counsel had voiced such an objection and the state trial court had sustained same.

Moreover, as explained above in the text, the evidence supporting the jury's verdict at the punishment phase of trial was overwhelming. Even if the petitioner's jury had been instructed to disregard the prosecution's colorful closing argument, the state trial court could not direct the petitioner's sentencing jury to also disregard the overwhelming evidence of the brutal nature of the petitioner's murder of Sandra Deptawa, the petitioner's demonstrated propensity for committing assaults while incarcerated, or the petitioner's lengthy criminal record. Thus, there is no reasonable probability that, but for the failure of petitioner's trial counsel to object to the closing portion of the prosecution's jury argument, the outcome of the punishment phase of petitioner's trial would have been any different.

would answer the two capital murder special sentencing issues in the manner it did. The prosecution's references to the blood of a fifteenth victim were little more than hyperbolic pleas for law enforcement. There is no reasonable probability that the failure of petitioner's trial counsel to object to same had any impact on the outcome of the punishment phase of petitioner's trial.

### 3. Conclusions

Petitioner's complaint regarding his trial counsel's failure to object to the prosecution's jury argument at the punishment phase of his capital murder trial fails to satisfy either prong of Strickland. Therefore, the Texas Court of Criminal Appeals' rejection on the merits of this same claim in the course of petitioner's state habeas corpus proceeding was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding.

### III. Certificate of Appealability

The AEDPA converted the "certificate of probable cause" that was required as a prerequisite to an appeal from the denial of a petition for federal habeas corpus relief into a Certificate of Appealability ("CoA").<sup>188</sup> The CoA requirement supersedes the previous requirement for a certificate of probable cause to appeal for federal habeas corpus petitions filed

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<sup>188</sup> See Hill v. Johnson, 114 F.3d 78, 80 (5th Cir. 1997) (recognizing that the "substantial showing" requirement for a CoA under the AEDPA is merely a change in nomenclature from the CPC standard); Muniz v. Johnson, 114 F.3d 43, 45 (5th Cir. 1997) (holding that the standard for obtaining a CoA is the same as for a CPC).

after the effective date of the AEDPA.<sup>189</sup> Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a CoA.<sup>190</sup> Appellate review of a habeas petition is limited to the issues on which a CoA is granted.<sup>191</sup> In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone.<sup>192</sup>

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right.<sup>193</sup> To make such a showing, the petitioner need not show that he will prevail on the merits but, rather, demonstrate that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further.<sup>194</sup> This Court is authorized to address the propriety of granting a CoA *sua sponte*.<sup>195</sup>

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<sup>189</sup> See Robison v. Johnson, 151 F.3d 256, 259 n.2 (5th Cir. 1998), cert. denied, 526 U.S. 1100 (1999); Hallmark v. Johnson, 118 F.3d 1073, 1076 (5th Cir. 1997), cert. denied sub nom. Monroe v. Johnson, 523 U.S. 1041 (1998).

<sup>190</sup> See Miller-El v. Johnson, 123 S. Ct. 1029, 1039 (2003); 28 U.S.C. § 2253(c)(2).

<sup>191</sup> See Lackey v. Johnson, 116 F.3d 149, 151 (5th Cir. 1997) (holding that the scope of appellate review of the denial of a federal habeas corpus petition is limited to those issues on which a CoA has been granted); 28 U.S.C. § 2253(c)(3).

<sup>192</sup> See Lackey v. Johnson, 116 F.3d at 151; Hill v. Johnson, 114 F.3d at 80; Muniz v. Johnson, 114 F.3d at 45; Murphy v. Johnson, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. § 2253(c)(3).

<sup>193</sup> See Miller-El v. Johnson, 123 S. Ct. at 1039; Slack v. McDaniel, 529 U.S. 473, 483 (2000); Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

<sup>194</sup> See Miller-El v. Johnson, 123 S. Ct. at 1039; Slack v. McDaniel, 529 U.S. at 484; Barefoot v. Estelle, 463 U.S. at 893 n.4.

<sup>195</sup> Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. If this Court rejects a prisoner's constitutional claim on the merits, the petitioner must demonstrate that reasonable jurists could find the court's assessment of the constitutional claim to be debatable or wrong.<sup>196</sup> In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether this Court was correct in its procedural ruling.<sup>197</sup>

The determination of whether an unsuccessful federal habeas corpus petitioner is entitled to a Certificate of Appealability must be viewed through the prism of the AEDPA's highly deferential standard of review. As explained above, except in rare instances, the AEDPA precludes this Court from undertaking *de novo* review of claims which the state courts have disposed of on the merits. Thus, the issue before this Court when determining whether to issue a CoA is not whether reasonable jurists could disagree with this Court's resolution of the merits

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<sup>196</sup> "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

**Miller-El v. Johnson**, 123 S. Ct. at 1040 (quoting **Slack v. McDaniel**, 529 U.S. at 484).

<sup>197</sup> **Slack v. McDaniel**, 529 U.S. at 484, 120 S.Ct. at 1604, (holding that when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct).

of petitioner's claims for federal habeas corpus relief but, rather, whether reasonable jurists could disagree with this Court's determination that the state habeas court acted reasonably when that court denied petitioner's claims on the merits.

In this cause, there is no basis for disagreement among jurists of reason with regard to this Court's conclusion that the Texas Court of Criminal Appeals acted in an objectively reasonable manner when it rejected the petitioner's claims of ineffective assistance on the merits. This Court has carefully reviewed the entire record from the petitioner's trial court proceedings, direct appeal, and state habeas corpus proceeding. This Court has independently concluded that none of the petitioner's complaints of ineffective assistance satisfy either prong of the Strickland test. Moreover, and more significantly under the AEDPA, this Court also concludes that the state habeas court's rejections on the merits of those same ineffective assistance claims were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's state habeas corpus proceeding. On the contrary, petitioner failed to present the state habeas court with any evidence showing how he was prejudiced by his trial counsel's alleged failures to adequately investigate petitioner's background or obtain a psychiatric evaluation of the petitioner.<sup>198</sup> Even if it were possible to disagree with the

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<sup>198</sup> In fairness to petitioner's state habeas counsel, given Dr. Sparks' testimony at petitioner's trial regarding the contents of petitioner's BCADC and TDCJ medical and psychiatric records, the most likely explanation for the failure of petitioner's state habeas counsel to present any evidence at petitioner's state habeas corpus hearing showing the petitioner suffered from a mental illness or defect was that no such evidence existed. One point on which both Dr. Alexander and Dr. Sparks were in total and complete agreement during their trial testimony was that petitioner's learning disability and resulting reading problems did not necessarily evidence either mental illness or low intellectual functioning.

Texas Court of Criminal Appeals' ultimate resolution of petitioner's ineffective assistance claims, there can be no rational disagreement with the assertion that the Texas Court of Criminal Appeals applied the Strickland test in an objectively reasonable manner when it rejected petitioner's ineffective assistance claims on the merits.

With the exception of its resolution of petitioner's purported "conflict of interest" claim, the Texas Court of Criminal Appeals applied the correct federal constitutional standard when it rejected each of the petitioner's claims herein. As explained above, the Texas Court of Criminal Appeals erroneously applied the less stringent Cuyler test to petitioner's purported "conflict of interest" claim but reasonably concluded the petitioner could satisfy neither the "actual conflict" nor the "adverse effect" prongs of that test. Moreover, this Court has independently concluded that petitioner's purported "conflict of interest" claim fails to satisfy either prong of the Strickland test. Under such circumstances, there can be no disagreement among reasonable jurists that petitioner's purported "conflict of interest" claim is without merit, either legally or from an evidentiary standpoint.

There is simply no basis for disagreement with this Court's latter assessment. During the petitioner's state habeas corpus proceeding, the petitioner made no effort to allege any specific facts, much less furnish any evidence, showing that either (1) there was any additional or new potentially mitigating evidence available at the time of trial which his trial counsel might have been able to discover or develop through a more thorough investigation into petitioner's background or mental health, (2) petitioner's family members could have offered any mitigating evidence regarding the petitioner's illiteracy that was not repetitious or cumulative of the testimony of Dr. Alexander, (3) the petitioner did not possess either sufficient ability at the time of trial to consult

with his attorney with a reasonable degree of rational understanding or a rational, as well as factual, understanding of the proceedings against him, (4) petitioner's trial counsel failed to perform any act as a result of financial considerations arising from the Bexar County fee arrangement which subsidized petitioner's defense at his capital murder trial, or (5) any legitimate basis existed for an objection to the prosecution's closing argument.

At the evidentiary hearing held in petitioner's state habeas corpus proceeding, petitioner's trial counsel furnished detailed, compelling rationales for their decisions (1) not to develop or introduce evidence at the punishment phase of trial regarding the petitioner's alleged history of cocaine abuse,<sup>199</sup> (2) not to call petitioner's family members to testify regarding the petitioner's illiteracy, and (3) not to request a mental health examination of the petitioner or a competency hearing for the petitioner. Likewise, petitioner's trial counsel testified that they had no difficulty communicating with the petitioner and were never aware of any facts or evidence indicating the petitioner was legally incompetent to stand trial.<sup>200</sup> Petitioner offered nothing to refute this testimony. In fact, the petitioner was unable to identify any aspect of his trial court proceedings which he claimed he had not understood. Petitioner failed to present the state habeas court with any evidentiary support for a finding that his trial counsel ever acted in a manner that fell below

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<sup>199</sup> It should be noted the petitioner offered no testimony at his state habeas corpus hearing to support a finding that either (1) he did, in fact, have a cocaine habit, (2) he had ever suffered from cocaine-induced psychosis, or (3) he was suffering from the effects of cocaine psychosis at the time he committed the murder of Sandra Deptawa.

<sup>200</sup> Petitioner has presented this Court with no authorities supporting the assumption implicitly underlying petitioner's Pate claim and his related ineffective assistance claim herein, i.e., that a low IQ test score during childhood automatically warrants a competency hearing in a criminal case held many years later, and this Court has found no authority to support this proposition.

an objective level of reasonableness or that any such alleged deficiency in the performance of his trial counsel “prejudiced” petitioner within the meaning of Strickland.

Likewise, the Texas Court of Criminal Appeals applied the correct federal constitutional standard when it rejected petitioner’s Pate claim on the merits. While petitioner spent considerable effort in his state habeas corpus application arguing over the appropriate interpretation of petitioner’s childhood IQ test scores, petitioner offered the state habeas court no evidence to refute either (1) the implicit and explicit factual findings made by the state trial judge regarding the petitioner’s demeanor prior to and during trial, including petitioner’s demonstrated ability to testify coherently at a pretrial hearing, (2) the testimony of petitioner’s trial counsel that (a) they had no difficulty communicating with the petitioner, (b) they were able to confer with their client throughout the trial court proceeding, and (c) they were never aware of any facts or evidence suggesting the petitioner was incompetent to stand trial, (3) the observations of the prosecuting attorney regarding the petitioner’s apparent ability to consult with his trial counsel during voir dire, or (4) Dr. Sparks’ testimony that the petitioner had demonstrated no indications of mental retardation during the months in which the petitioner was detained at the BCADC awaiting trial or during any of the petitioner’s previous terms of incarceration in the TDCJ. Moreover, petitioner’s own testimony during his state habeas corpus hearing established beyond any doubt that (1) he was able to effectively communicate to his counsel his version of the events leading up to his execution of his written statement, (2) he conferred extensively with his trial counsel regarding the issue of whether he should testify at either phase of trial, and (3) while he did not like his counsel’s advice that he (petitioner) not testify at trial, he was ultimately convinced it was in his best interests not to do so. Under such circumstances, there can be no disagreement

among reasonable jurists that the Texas Court of Criminal Appeals acted in an objectively reasonable manner when it rejected petitioner's Pate claim on the merits.

None of the claims raised by the petitioner herein make a substantial showing of the denial of a federal constitutional right. Reasonable jurists could not debate, much less agree, that the petitioner's claims herein should have been resolved in a different manner or that any of the petitioner's claims herein present issues which deserve encouragement to proceed further. Therefore, petitioner is not entitled to a CoA with regard to any of his claims for federal habeas corpus relief herein.

Accordingly, it is hereby **ORDERED** that:

1. All relief requested in petitioner's petition for federal habeas corpus, filed February 25, 2000,<sup>201</sup> is **DENIED**.
2. Petitioner is **DENIED** a Certificate of Appealability.
3. All other pending motions are **DISMISSED AS MOOT**.
4. The Clerk shall prepare and enter a Judgment consistent

with this Memorandum Opinion and Order.

IT is so **ORDERED**.

SIGNED this 31<sup>st</sup> day of March, 2003.



FRED BIERY  
UNITED STATES DISTRICT JUDGE

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<sup>201</sup> See docket entry no. 8.